A HIGH COURT OF JUSTICE (CHANCERY DIVISION)—14, 15 AND 30 JULY 1993

COURT OF APPEAL—24 AND 25 NOVEMBER AND 15 DECEMBER 1993

B

HOUSE OF LORDS—7, 8 AND 9 MARCH AND 23 JUNE 1994

C

National Westminster Bank plc *v*. Commissioners of Inland Revenue
Barclays Bank plc *v*. Commissioners of Inland Revenue([1])

Income Tax—Reliefs—Business expansion scheme—Relief precluded for scheme involving loan facilities where shares issued on or after 16 *March* 1993*—Applications for shares processed, cheques presented for payment, allotments made, and applicants notified by that date, but registration in companies' registers of members taking place later—Whether shares issued before* 16 *March—Income and Corporation Taxes Act* 1988, *ss* 289, 299A, 311(1)*—Finance Act* 1988, *s* 50.

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On 2 March 1993, under a business expansion scheme sponsored by two banks, five companies jointly issued a prospectus offering 25m ordinary shares at £1 per share payable in full on application. The prospectus offered a loan facility, the overall result of which was that a higher rate taxpayer would be able to recover, in the form of a loan after 6 months, more than the net cost to him of his investment after taking into account business expansion scheme tax relief under s 289 Income and Corporation Taxes Act 1988, so that the scheme would avoid the adverse effect on the taxpayer of the requirement of s 289 that an eligible share for the purposes of the tax relief must be one that produces no return for 5 years. The prospectus further provided that the directors of the companies would have a discretion to allocate applications for shares among the companies, that pending the issue of shares to investors subscription money would be paid into designated accounts on which the interest would be for the account of the companies, and that the shares would be registered in the name of a nominee company on the basis that acceptance of an application would constitute the making of an agreement between investor and nominee in terms set out in the prospectus.

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By 10 March applications had been received for the shares on offer; the successful applicants were allocated shares in one or other of the five companies; and on 12 March the board of directors of each company resolved to allot the new shares according to that allocation and authorised the sealing of share certificates issued pursuant to that allotment. Successful applicants were notified by letter of 12 March of the allotment and were told that within 28 days they would receive Certificates of Beneficial Ownership. The cheques were presented for payment by 15 March. Sometime after 16 March but by 2 April the company secretaries registered the nominee company as the holder of all 25m shares in the companies' registers of members.

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([1]) Reported (ChD) [1993] STC 639; (CA) [1994] STC 184; (HL) [1994] 3 All ER 159; [1994] STC 580.

Some of the applicants' cheques were dishonoured and on 2 June those who had not paid by 21 May were told that their shares had been forfeited. A

A similar business expansion scheme was sponsored by another bank, except that the cheques of some unsuccessful applicants were retained and, as appropriate, substituted for dishonoured cheques. All the steps under that scheme were taken before 16 March except that the nominee company was entered in the companies' registers of members only on 2 April. B

The banks and two of the companies issued Originating Summonses, including Motions, for declarations that for the purposes of Chapter III of Part VII of the 1988 Act, including the new s 299A being introduced by the Finance Act 1993, the shares were issued before 16 March. C

The Chancery Division held, making the declarations sought, that the shares were "issued" within the meaning of s 299A before 16 March because "issued" referred to the point of time at which a mutual obligation between the applicant and the company arises obliging the applicant to take the shares concerned and the company to cause them to be registered in his name or that of his nominee; that was a point of time which could be ascertained with certainty; the word "issue" has no fixed meaning and is not a term of art; decisions on its meaning in other statutory contexts were of limited assistance, but the meaning accorded was consistent with the approach adopted in previous cases to the construction of the word; there was no reason to think that the legislature intended the availability of business expansion scheme tax relief to be dependent on the actual registration of shareholders or the issue of share certificates; it made perfectly good sense that the relief should be available where each party was irrevocably bound, on the part of the company to complete the formalities, and on the part of the taxpayer to submit to their completion; that occurred when the allotments had been made and letters of allotment had been sent to successful applicants. By virtue of s 311(1) of the 1988 Act the question had to be answered on the hypothesis that the shares had eventually been registered in the names of the beneficial owners, and not the names of the nominees, so that the position of the nominees was irrelevant to the question. D E F

The Crown appealed. G

The Court of Appeal (Dillon and Mann L.JJ., Hirst L.J. dissenting), held, allowing the Crown's appeals, that the shares were not issued before 16 March because, by sending an applicant a letter of allotment (whether or not renounceable), a company grants the applicant a chose in action, the right to have the shares issued to him, but the issue only comes when he (or, if appropriate, a successor in title by renunciation or successive renunciations) is entered in the register as the holder of the shares; "issue" is distinct from allotment and requires something to complete or perfect the title of an allottee of shares, which can be nothing short of registration or the issue of a certifiate. H I

The banks and the two companies appealed.

Held, in the House of Lords (Lords Templeman, Slynn of Hadley and Lloyd of Berwick, Lords Jauncey of Tullichettle and Woolf dissenting), dismissing the appeals, that the word "issue" in the Income and Corporation Taxes Act 1988 was appropriate to indicate the whole process whereby unis-

A sued shares are applied for, allotted and finally registered; throughout the Act Parliament had been obliged to choose a fixed and certain date, and Parliament had chosen not the date when shares are allotted but the date when they are issued..

B In *Re Ambrose Lake Tin and Copper Co. (Clarke's Case)* (1878) 8 ChD 635, and *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134 considered.

C By Originating Summones, including Motions, in the Chancery Division, the banks and the two companies appealed for declarations as to the purposes of Chapter III, of Part VII of the Income and Corporation Taxes Act 1988, including the new s 299A being introduced by the Finance Act 1993. The facts are as set out in the judgment.

D The application was heard in the Chancery Division before Rattee J. on 14 and 15 July 1993 when judgment was reserved. On 30 July 1993 judgment was given against the Crown, with costs.

Robin Potts Q.C. and *Kevin Prosser* for the Banks and the Companies.

E *Anthony Grabiner Q.C.* and *David Unwin* for the Crown.

The following cases were cited in argument in addition to the cases referred to in the judgment:—*Spitzel* v. *The Chinese Corporation Ltd.* (1899) 80 LT 347; *Attorney-General* v. *Mayor, Aldermen and Citizens of the City of* F *Liverpool* [1902] 1 KB 411; *Mercantile Credit Private Ltd.* v. *Industrial and Commercial Realty Co. Ltd.* (1983) 7 ACLR 711.

G **Rattee J.**:—These proceedings raise a question of construction of s 299A added to the Income and Corporation Taxes Act 1988 ("the Taxes Act") by the Finance Act 1993 which received the Royal Assent on 27 July 1993. Since the matter is one of some urgency, I agreed to hear argument on the true construction of the new section after the Finance Bill had passed the stage of third reading on the basis that I would not deliver judgment until after the Bill had received the Royal Assent and thereby become law.

H Section 289 of the Taxes Act provides relief from income tax where an individual subscribes to what is called a business expansion scheme ("BES"). It applies where an individual subscribes for what in s 289(1) are referred to as "eligible" shares in a "qualifying" company, which shares are defined in I the section as being, in effect, new ordinary shares which carry no right to dividend for the period of five years beginning with the date of their issue in companies carrying on certain defined businesses or activities. The details of these definitions do not matter for present purposes, and nor do the complex provisions of s 289 as to the manner in which, and conditions subject to which, the relief from income tax is given. Section 50 of the Finance Act 1988 extended the relief, subject to certain modifications to eligible shares in com-

panies carrying on the activity of providing dwelling-houses for letting on qualifying tenancies as defined in that section. A

The effect of the complex provisions of these sections was *prima facie* only to give tax relief in respect of an investment which the taxpayer could not realise for five years. However, schemes have been devised which qualified as business expansion schemes for the purpose of the tax relief, but under which the investor securing the relief was none the less able, in effect, to realise his investment immediately, by means of taking a loan from a financial institution promoting the particular scheme, on which no repayment would fall to be made and no interest would fall to be paid until the shares concerned could be realised five years after their issue without infringing the conditions laid down by s 289 of the Taxes Act. It was accepted before me that the purpose of the new s 299A is to prevent this particular form of tax avoidance in respect of shares issued on or after 16 March 1993. B C

Section 299A(1) is in the following terms:

"An individual shall not be entitled to relief in respect of any shares in a company issued on or after 16th March 1993 if— D

(*a*) there is a loan made by any person, at any time in the relevant period, to that individual or any associate of his; and

(*b*) the loan is one which would not have been made, or would not have been made on the same terms, if that individual had not subscribed for those shares or had not been proposing to do so." E

The "relevant period" referred to is that defined in s 289(12) of the Taxes Act. The definition is not relevant for present purposes.

Section 311(1) of the Taxes Act provides that: F

"Shares subscribed for, issued to, held by or disposed of for an individual by a nominee shall be treated for the purposes of this Chapter [of which sections 289 and 299A form part] as subscribed for, issued to, held by or disposed of by that individual."

The short point that arises for decision in these cases is the meaning of the word "issued" in s 299A for the purpose of determining whether the shares concerned in the cases were issued on or after 16 March 1993 and are, therefore, caught by s 299A if the subscribers, therefore, take a loan in connection therewith within the relevant period. The question arises in the following context. G H

The NatWest Bank Scheme

This is a business expansion scheme sponsored by National Westminster Bank plc ("NatWest") and Hambros Bank plc. Five companies, all having the word "Homeshare" in their names, were incorporated for the purpose of the scheme. NatWest holds the ordinary shares in each company. On 2 March 1993 a prospectus was issued jointly by the five companies offering for subscription up to 25m ordinary shares of 50p each at £1 per share payable in full on application. The companies were qualifying companies for the purpose of s 289 of the Taxes Act, carrying on activities which were "qualifying activities" as defined in s 50 of the Finance Act 1988. It is not disputed by the Revenue that the shares offered for subscription were "eligible shares" as I

A defined in s 289 of the Taxes Act, and that, therefore, a subscription for those shares would *prima facie* attract tax relief under s 289.

The prospectus stated that persons who subscribed for shares would be offered a loan by NatWest of an amount equal to 74 per cent. of the gross amount of their investment not later than six months after the issue of the B shares. The interest payable on the loan would, said the prospectus, be fixed at such a rate that the principal of, and rolled-up interest on, the loan would be exactly covered by the minimum return of £1.08 per share which the prospectus said would be made available by way of realisation of the investment after five years, either by liquidation of the companies or by a purchase of the shares concerned. NatWest would take a charge over the shares to C secure repayment of the loan. The overall result of the scheme to a higher rate taxpayer would be that he would recover in the form of the loan within six months more than the net cost to him of his investment after taking into account BES tax relief under s 289 of the Taxes Act. Thus, the scheme would avoid the adverse effect on the taxpayer of the requirement of s 289 that an eligible share for the purposes of BES tax relief must be one that produces no D return for five years. This is clearly the sort of device at which the new s 299A is aimed. The question is whether it has caught this particular scheme.

The prospectus stated that the directors (defined as the directors of each of the five Homeshare companies) should have a discretion to allocate applications for shares among the companies, and contained two further provi- E sions on which the plaintiffs rely and to which I should, therefore, refer. Firstly, the prospectus states that "... pending the issue of shares to investors subscription monies will be paid into designated interest-bearing accounts. Interest will be for the account of the Companies". Secondly, it provides that "... to facilitate realisation of the Shares after five years, Shares in the F Companies will be registered in the name of NatWest Nominees Limited ('the Nominee'), a nominee company wholly owned by NatWest". Included in the prospectus was a form of agreement headed "Nominee Agreement", which commences with the following words:

> "The following terms and conditions apply with effect from the allotment of any Shares for which an investor's application is accepted G to regulate the arrangements relative to the holding of such Shares on the investor's behalf by NatWest Nominees Limited ('the Nominee'), a wholly owned subsidiary of NatWest."

The nominee agreement goes on to provide that the nominee will agree to accept appointment as nominee "... by notifying NatWest it is the H investor's nominee", and that the investor irrevocably authorises the nominee to act as nominee on his behalf in respect of such shares for which his application is accepted. Finally, the agreement provides by clause 11 thereof that the investor acknowledges that acceptance of his application by "... the Directors constitutes a binding contract between him and the Nominee on the terms of the Nominee Agreement". Moreover, the prospectus itself con- I tains a provision that "... acceptance of an application will constitute the making of an agreement in respect of the Shares between the Nominee and the investor on the terms of the Nominee Agreement".

Annexed to the prospectus was an application form to be completed by intending investors. It contains the following words on which the plaintiffs rely:

"I hereby irrevocably offer to subscribe for the number of fully paid Ordinary Shares of 50p each ('Shares') at £1 each specified above in the capital of a Homeshare Company ('the Company') selected by the Directors upon the terms of [the prospectus]... I irrevocably request and authorise you to register any Shares for which this application is accepted in the name of [the Nominee] and I understand that acceptance of this application form duly completed will constitute the entering into of [the Nominee Agreement]."

By 10 March 1993 Hambros Bank Ltd., to whom applicants were told to address their applications, had received applications for the 25m shares on offer. The successful applicants were allocated to one or other of the five Homeshare companies. Cheques sent by applicants were presented for payment by 15 March.

Meanwhile, on 12 March, a duly constituted committee of the board of directors of each of the Homeshare companies (the committee consisting of the same two individuals in the case of all the companies) met and resolved to allot the new ordinary shares to the successful applicants. A minute of the meeting prepared in respect of each of the five companies contains the following paragraphs:

"2. *Allotment*

2.1 It was Resolved that 5,000,000 new Ordinary Shares be and they are hereby allotted credited as fully paid up in consideration of there having been paid to the Company £1.00 per new Ordinary Share, such allotment being on the terms of the Prospectus and the Application Forms contained therein and such allotment to be made to applicants who had delivered to the Registrars Application Forms duly completed and the full consideration payable in cash and the said shares shall be duly registered in the names of those persons set out in the lists prepared by the Registrars and delivered to the Company.

3. *Sealing Share Certificates and Filing*

3.1 It was Resolved that authority be and it is hereby given for the Securities Seal of the Company to be affixed to all definitive certificates in respect of new Ordinary Shares to be issued pursuant to the allotments referred to at paragraph 2 above."

The lists referred to in para 2.1 of the minute were lists headed with the name of the relevant Homeshare company and with the legend "Natwest Nominees Limited for and on behalf of:—" followed by the names of the successful applicants and the shares allotted to them in the Homeshare company whose name appeared at the head of the list.

Later on the same day as the meeting to which I have just referred, 12 March, Hambros sent an undated letter to each of the successful applicants in the following form:

"Dear Investor

The Homeshare Companies
Offer for Subscription made under the Business
Expansion Scheme

A We acknowledge receipt of your application and confirm that shares have been allotted to you to the full amount applied for.

You will receive within the next twenty-eight days a Certificate of Beneficial Ownership in respect of this investment."

B The company secretary of each of the five companies registered NatWest Nominees Ltd. as the holder of all 25m shares in the company's register of members on or before 2 April 1993, but after 16 March.

Some of the cheques sent by successful applicants, in respect of whom shares were allotted at the meeting of 12 March, were subsequently dishon- C oured on presentation for payment. At board meetings of the Homeshare companies held on 21 April 1993, the board of each company resolved to proceed to forfeit the shares allotted in respect of such applicants. On 30 April a letter was sent to each of those applicants by the company concerned informing him that his shares would be forfeited unless the subscription price was paid on or before 21 May. Such of the persons concerned who did not D pay by that date were sent a notice on 2 June telling them that their shares had been forfeited. It seems questionable whether such procedure properly complied with the procedure laid down by Article 26 of the companies' articles of association, in that the notices I have mentioned were sent not to the registered shareholder (the nominee company) as required by the Article, but to the beneficial owner. However, nothing turns on this for the purpose of E the issue I have to decide.

The Barclays Scheme

A similar business expansion scheme was sponsored by Barclays de Zoete Wedd Ltd., part of the Barclays group. By a prospectus issued on 26 February 1993 five companies, each having the name Gracechurch in its F name ("the Gracechurch companies") formed for the purpose of the scheme and having as their objects the carrying-on of "qualifying activities" within the meaning of s 50 of the Finance Act 1988, offered for subscription shares of a nature qualifying as "eligible shares" within the meaning of s 289 of the Taxes Act, namely 25m ordinary shares of 50p each at £1 per share payable in full on application. The prospectus contained provisions indistinguishable G for present purposes from those contained in the prospectus issued under the NatWest scheme. The nominee company was named as Barclays Nominees (Branches) Ltd., and the loans were to be made available by Barclays Bank.

By 3 March duly completed applications for all the 25m shares on offer had been received. The successful applications were allocated to one or other H of the Gracechurch companies. Cheques sent by successful applicants were paid into an account opened for the purpose by Barclays Registrars. On 11 March those monies, less expenses, were transferred to accounts in the names of the Gracechurch companies. Cheques sent by unsuccessful applicants were returned to those applicants, save that with the consent of the applicants concerned cheques to the total value of £250,000 were retained in case cheques of I some successful applicants were dishonoured, in which case, as happened, the applicants whose cheques had been retained were substituted for those whose cheques were dishonoured.

Meanwhile, on 4 March, a letter was sent by Barclays Registrars to each successful applicant which contained the following paragraphs:

"Subject to clearance of your cheque and the allotment of shares, your application has been successful. Subject to and following allotment, you will receive from us, in due course, a Certificate of Beneficial Ownership which details the number of shares allotted to you within the relevant Gracechurch BES Company."

On 10 March a committee of the board of each of the Gracechurch companies (consisting of the same two individuals in each case) met. Minutes of those meetings record resolutions in identical terms to those of the minutes of the meetings of the committees of the boards of the Homeshare companies to which I have referred in the summary of the NatWest scheme. The lists referred to in those resolutions in this case were headed in each case "Barclays Nominees (Branches) Ltd. for and on behalf of": and contained the names of the successful applicants and the number of shares allotted to each.

In due course, returns of allotment were sent to the Registrar of Companies. Barclays Nominees (Branches) Ltd. was entered in the Gracechurch companies' registers of members in respect of all 25m shares on 2 April 1993.

Before 16 March other applicants, whose cheques had been retained against that eventuality, were substituted on the lists referred to in the board minutes to which I have referred for applicants whose cheques had been dishonoured on presentation for payment. The directors of the Gracechurch companies, unlike the directors of the Homeshare companies, apparently did not think it necessary to go through the process of first forfeiting the shares allotted to those applicants.

The question that is raised by these proceedings is whether, in the case of the shares in the Homeshare companies and those in the Gracechurch companies, they were issued on or after 16 March within the meaning of the new s 299A of the Taxes Act. If they were, any shareholder taking up the offer of a loan pursuant to either scheme will *prima facie* lose any BES tax relief to which he would otherwise be entitled. As the loans will fall to be offered pursuant to the schemes within the next two months, it is of some importance that this question be determined as a matter of some urgency.

In these circumstances, National Westminster Bank plc and one of the Homeshare companies as plaintiffs issued an originating summons joining the Commissioners of Inland Revenue as defendant and seeking a declaration that, for the purposes of Chapter III of Part VII of the Taxes Act, including the new s 299A, the shares were issued before 16 March. An exactly similar originating summons was issued by Barclays Bank plc and one of the Gracechurch companies in relation to the shares in the Gracechurch companies. A motion was then launched in each originating summons seeking the same declaration as a means of bringing the matters urgently before the Court. Those motions are now before me.

At the outset of the hearing I queried the appropriateness of the procedure adopted and whether the question raised ought not to be left to be determined as between individual taxpayers and the Revenue by way of appeal from a decision of the Revenue on a claim for tax relief. However, it was pointed out on behalf of the plaintiffs that the companies are concerned

A to know the answer to the question as a matter of urgency, because in order to enable shareholders to claim tax relief under s 289 of the Taxes Act the companies have to give to the Revenue details of the shares concerned, and in particular the date on which the shares were issued. They do not know what answer to give until the question raised by these proceedings is answered. The Revenue did not object to my determining the question in the
B context of these proceedings, and I think it appropriate that I should do so.

The Revenue submits that the shares were issued on or after 16 March 1993 because they were not issued until the name of the nominee was entered in the relevant company's register of members, which in all cases (and this is
C not disputed) took place after 16 March.

The plaintiffs submit that the shares were issued before 16 March, because they were issued as soon as the companies and the applicants became contractually bound, the companies to enter the name of the nominee in the register and the applicants to accept such entry of the nominee as nominee
D for them. Issue of the shares was not dependent on actual registration. The time at which the contractual relationship which I have mentioned came into being, and, therefore, the time at which the shares were issued, was the point of time at which the shares had been allotted to the applicants and the acceptance of their applications for that allotment had been communicated to the
E applicants. In the case of the NatWest scheme this was 12 March, when, the shares having been allotted the same day, letters were sent to the applicants informing them of this. In the case of the Barclays scheme it was 10 March when the boards of the Gracechurch companies allotted the shares to the applicants, the applicants having already been told of the acceptance of their applications by the letters sent to them on 4 March.

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I was referred to a number of cases in which the Court has considered the meaning of the word "issued" in relation to shares in other contexts, to some of which I should refer.

G In *Re Imperial Rubber Co.* (*Bush's Case*) (1874) 9 Ch App 554, the company concerned had entered into a contract to buy property in consideration partly of an issue of paid-up shares. On 25 January 1869 an entry was made by the company in its books to the effect that the relevant shares were allotted to the vendors, as to some of the shares to one Tucker as a nominee for one of the vendors. Before he had been registered in the company's register
H of members and before any share certificate had been issued to him, the nominee sold some of the shares allotted to him to one Bush. The company was shortly afterwards wound up. The question arose whether Bush should be included in the list of contributories. The answer depended on whether, for the purposes of s 25 of the Companies Act 1867, the shares were issued before the contract pursuant to which they were allotted was registered with
I the Registrar of Joint Stock Companies, which it was before anyone had been registered as holder of the shares concerned and before any certificate had been issued in respect thereof. In the course of his judgment, with which Sir George Mellish L.J. concurred, Sir William James L.J. said[1]:

[1] (1874) 9 Ch App 554, at page 556.

"There is no evidence that the shares ever left the control of the company; or ever became the property of Mr. *Tucker*, or of anyone else, until the certificate was issued in accordance with the resolution previously passed, and on that his title is complete."

This *dictum* was commented upon in *Re Heaton's Steel and Iron Company* (*Blyth's Case*) (1876) 4 ChD 140. The decision in that case does not help on the question when shares are issued, but in the course of his judgment Brett J.A. said[1]:

"In *Bush's Case* the issue of the certificates was merely taken as evidence of the time when the shares were issued, but this must not be taken to mean that shares are not issued until the certificates are issued."

James L.J., the author of the *dictum* in *Bush's Case*, said[1]:

"I think it desirable to say, as the Appellant appears to have been misled by the marginal note to *Bush's Case*, that the notion that shares are only issued when the certificates are issued is a blunder which could hardly be attributed to us."

Re Ambrose Lake Tin and Copper Co. (*Clarke's Case*) (1878) 8 ChD 635 was another case in which the Court had to consider whether, for the purpose of s 25 of the Companies Act 1867, shares had been issued before a contract pursuant to which they had been allotted, had been registered. In that case, the company concerned had resolved to allot the shares but nothing further had been done towards completing their registration or the issue of certificates before registration of the contract. In the course of his judgment holding that the shares had not been issued, Cockburn L.C.J. said[2]:

"I must say I entertain no doubt upon the question before us, which turns upon what is the meaning of the term 'issue' in the statute 30 & 31 Vict. c. 131, s. 25. The company was perfectly competent to allot shares, and did allot shares. The Act of Parliament imposes no condition upon allotment such as it imposes on the issue of shares, and I think that, inasmuch as the term 'issue' is used, it must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete."

James L.J., agreeing that the shares had not been issued, said[3]:

"... nothing had occurred by virtue of which the company could have said to the shareholder 'You are bound to take shares from me' nor anything by virtue of which the shareholder could have said, 'I have become a shareholder in your company'."

Cotton L.J., also agreeing that the shares had not been issued, said[4]:

"There are many cases, and *Blyth's Case* is an example, where although no certificates have been issued, yet the transaction is complete—the allottee has become complete master of the shares, and a mere

(1) (1876) 4 ChD 140, at page 142. (2) (1878) 8 ChD 635, at page 638.
(3) *Ibid*, at page 639. (4) *Ibid*, at pages 641/642.

A failure to perform the formal act of issuing the certificate does not prevent the shares from being issued within the meaning of the section."

The next case relied on by the plaintiffs was a decision of the High Court of Australia on the application of a statutory provision to the effect that no company "... shall proceed to the issue to any of its employees of B any share in the company... " until the consent of the Industrial Court had been obtained thereto. The case is *Central Piggery Co. Ltd.* v. *McNicoll* (1949) 78 CLR 594. In the course of his judgment, Latham C.J. said:

"The question is whether on the day they became employees of the company, the company had proceeded to the issue of shares to them. It C has been established for many years that an application for shares is an offer which may be accepted by allotment notified to the applicant. In the absence of a communication in the general sense of the law of contract (even though it may fail to reach the applicant) there is no acceptance of the offer and therefore no contract. In the present case the applicants did not become shareholders until notification of the allot- D ment was received by them or perhaps placed in the post. The notification was posted after they had become employees. The question is whether the company had proceeded to the issue of any shares. Mr. Bennett argued that the phrase applied only to the first step of the process, which culminated in the issue of shares, and that if the first step was taken, as in the present case, before the relationship of employer E and employee was established then there was no breach of the statute. There is a distinction between proceeding to issue shares and proceeding towards the issue of shares. The section deals with the whole process from the initial step to the actual issue. The words used are 'issue to any of its employees'. The issue of the shares is the act which ends the transaction and ends in the issue of the shares to a specific person, an F employee. The act of issuing involves a set of proceedings which result in the employee becoming a shareholder. That is what the statute is designed to meet."

Dixon J. delivered a concurring judgment containing the following passage:

G "The question is whether in these circumstances the provisions of s. 4 of The Industrial Conciliation and Arbitration Acts were transgressed. It was said on behalf of the company that it had proceeded to issue the shares before McNicoll and Hurst became employees of the company and that therefore the provisions of the section had not been transgressed. It thus becomes necessary to decide what the word 'issue' H means. It is a word which in other departments of the law has a definite meaning, but not in this. In *Levy* v. *Abercorris Slate and Slab Company* (1887) 37 Ch.D. 260 at p. 264 Chitty J., in considering the nature of a debenture, said: 'It must be "issued", but "issued" is not a technical term, it is a mercantile term well understood; "issue" here means the delivery over by the company to the person who has the charge.' In I *Koffyfontein Mines Ltd.* v. *Mosely* [1911] A.C. 409 the House of Lords affirmed the decision of the Court of Appeal *sub. nom. Mosely* v. *Koffyfontein Mines Ltd.* [1911] 1 Ch. 73. Fletcher Moulton L.J. [1911] 1 Ch. at pp. 82–83 deals with the creation of shares as distinct from the issue of shares. Farwell L.J. [1911] 1 Ch. at p. 84 points out that 'the words "creation", "issue" and "allotment" are used with three different meanings familiar to business people as well as lawyers.' His Lordship

says:—'There are three steps with regard to new capital; first it is created; till it is created the capital does not exist at all. When it is created it may remain unissued for years ... When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in *Spitzel* v. *Chinese Corporation* (1899) 80 L.T. 347, at p. 351 he says: "What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person".'

Speaking generally the word 'issue' used in relation to shares means, where an allotment has taken place, that the shareholder is put in control of the shares allotted. A step amounts to issuing shares if it involves the investing of the shareholder with complete control over the shares."

On the basis of these authorities, as well as some others to which I do not think it necessary to refer, the plaintiffs submit that the issue of a share is not dependent on either registration or the issue of a share certificate. All that is necessary, in order for a company to issue a share, is for it to take the necessary steps to achieve a situation in which both (a) the intended shareholder is entitled to be entered on the register of members of the company and (b) the company is entitled to compel the intended shareholder to become a member by registration. Counsel for the plaintiffs submitted that such a situation in which both parties are bound is to be contrasted with, for example, the issue of renounceable letters of allotment, which does not bind the allottee to take up the shares and which, therefore, as the Court held in *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134, does not amount to the issue of the shares comprised in the renounceable letter of allotment. In that case, the question was as to the meaning of the words "the issue of shares" in s 55(1)(c)(i) of the Finance Act 1927, which provided relief from stamp duty in relation to a scheme of reconstruction of a company, if the consideration for the acquisition of an undertaking by a company consisted as to not less than 90 per cent. in the issue of shares in the transferee company to holders of shares in the transferor company. The question arose whether, for this purpose, the issue of renounceble letters of allotment constituted the issue of shares. The Court of Appeal held that it did not. In the course of his judgment Lord Hanworth M.R. (at page 155) said this:

"I have come to the conclusion, after considering a great number of cases which have been brought to our attention... that it is impossible to say that the word 'issue' is used in all Acts of Parliament and in all circumstances with the same meaning. I think that an illustration of the divergence in its meaning is to be found by looking at *Clarke's Case* ((1878) 8 Ch.D. 635) and contrasting it with observations made in *Mosely* v. *Koffyfontein Mines Ltd.* ([1911] 1 Ch. 73, 80), by the Master of the Rolls. It is obvious that different meanings may be attributed to the word 'issue' according to the circumstances of the particular case under consideration; but in *Clarke's Case*, which went to the Court of Appeal, it is quite obvious that both the Lord Chief Justice (Sir Alexander Cockburn) and Cotton L.J. really thought of the word 'issue' as something distinct from allotment, and as importing some subsequent act whereby the title of the allottee became complete."

Slesser L.J. said (at pages 156–7):

"... the words of sub-s 6(*b*), speaking of the new company being 'the beneficial owner of the shares so issued to it,' seem to me to be valu-

A able in construing the word 'issue' when applied to a shareholder equally with a company. I think there is contemplated in both cases a continuity of personality and that the word 'issue' means such an issue as effectually makes the shareholder in the new company a beneficial owner and not merely a person with an equitable right to call upon the company subsequently to register him as a beneficial owner, as would be the case B if the mere allotment in itself, accompanied by a form of renunciation, were to be the same as 'issue'."

Romer L.J. (at page 157) concluded that:

"... whatever the word 'issue' may mean in other collocations, here C it is equivalent to the creation of a registered shareholder."

Counsel for the Revenue relied on the last-mentioned case and on *Clarke's Case* as authority for the proposition of law set out in a press release issued by the Revenue on 16 March 1993:

D "Shares are treated as having been issued to someone when his or her title to them has become complete. This will normally happen when the shareholding has been entered in the company's Register of Members. It is not necessary, however, for the share certificate to have been issued."

E Counsel for the Revenue submitted that that press release stated the law accurately, and that, in the present case, the shares in the two schemes were not issued until the nominees were entered on the registers of members. Counsel referred me to the following statement in *Halsbury's Laws of England*, 4th. Edn., Vol. 7(1) para 425 (which was judicially approved by its author, Walton J., in *Agricultural Mortgage Corporation* v. *Commissioners of* F *Inland Revenue*(1) [1978] Ch 72, at page 82):

"The term 'issue' is also used in connection with shares. The shares which are signed for by the signatories to the memorandum are issued when the company is registered. As regards other shares, when a person who has agreed to take shares is entered on the register as a shareholder, G the shares have been issued to him, although he has not obtained the share certificate. However, a resolution to allot shares is not necessarily the issue of them, and the term seems to mean allotment followed by registration or possibly by some other act, distinct from allotment, whereby the title of the allottee becomes complete."

H *Agricultural Mortgage Corporation* v. *Commissioners of Inland Revenue* (*supra*) was a case concerning the issue of loan capital. In the course of his judgment in the Court of Appeal, at page 101 of the report, Goff L.J. said this(2):

"Mr. Bromley [counsel for the Revenue] also relied upon the proposition, which is established by authority, that shares in a company can be I held to have been issued although no certificate for them had been delivered: see *In Re Heaton's Steel and Iron Co.* (*Blyth's Case*) (1876) 4 Ch.D. 140. The ratio decidendi of that case and of *In Re Ambrose Lake Tin and Copper Co.* (*Clarke's Case*) (1878) 8 Ch.D. 635 is, however, that to con-

(1) [1978] 1 All ER 248. (2) *Ibid*, at page 260f/g.

stitute an issue of shares there must be something more than allotment, and that something may be either registration or the issue of a certificate, which is entirely consistent with Mr. Curry's submission that there must be something emanating from the company to constitute the issue and perfect the title of the lender." A

To similar effect was a statement in Buckley on Companies, 13th Edn. (1957) which was approved by Harman J. in *Holmleigh (Holdings) Ltd.* v. *Commissioners of Inland Revenue* 46 TC 435, at page 453. B

Counsel for the Revenue submitted that, in the context of the present case, the shares were only issued when the nominees were entered on the registers of members in respect thereof. He pointed out that this conclusion was consistent with the documentation used by the plaintiffs, in particular with the references in the board minutes recording the resolutions to allot the shares to shares "to be issued" pursuant to the allotments therein referred to. I do not accept that the use of these words in the minutes is really any help on the question of what constitutes issue of the shares for the purposes of s 299A of the Taxes Act. C D

Counsel for the Revenue also relied on the fact that even after the Gracechurch companies had resolved to allot the shares, having previously notified the successful applicants of their intention so to do, the companies substituted new names on the lists of allottees in substitution for the names of those whose cheques had been dishonoured. This, it was submitted, was inconsistent with the shares having already been issued by virtue of the resolutions to make the allotments. Again, I do not accept that the directors' perception of the legal position can really affect the answer to the question I have to determine, namely when were the shares issued within the meaning of that word in s 299A of the Taxes Act? E F

More persuasive, in my judgment, was the submission of counsel for the Revenue that "issue" must be given the same meaning in the many instances in which it is used throughout Chapter III of Part VII of the Taxes Act, and that in the context of those provisions referring to a specific date of issue of the shares concerned the word must be given a meaning which enables a precise point of time to be ascertained as the time at which shares are issued. G

I accept this last submission, but, in my judgment, the meaning for which the plaintiffs contend, namely the point of time at which a mutual obligation between the applicant and the company arises, obliging the applicant to take the shares concerned and the company to cause them to be registered in his name or that of his nominee, does enable the point of time of issue to be ascertained with certainty. As is plain from the authorities to which I have referred, the word "issue" has no fixed meaning. It is not a term of art, and decisions on its meaning in other statutory contexts are of limited assistance. However, the meaning contended for by the plaintiffs is consistent, in my judgment, with the approach adopted in those cases to the construction of the word. Moreover, I see no reason to think that the legislature intended the availability of BES tax relief to be dependent on the actual registration of shareholders or the issue of share certificates. It makes perfectly good sense that the availability of the relief should depend on a situation having arisen in which each party is irrevocably bound, on the part of the company, to complete those formalities, and, on the part of the taxpayer, to submit to their completion. H I

A I agree with the submission of the plaintiffs that this situation arose in the case of the NatWest scheme on 12 March, when the letters of allotment were sent to successful applicants, and in the case of the Barclays scheme on 10 March, when the companies resolved to allot the shares, letters of acceptance already having been sent to the successful applicants. I accept the submission that, by virtue of the provision in s 311(1) of the Taxes Act, the B present question should be answered on the hypothesis that the shares had eventually been registered in the names of the beneficial owners, and not the name of the nominees. The interposition of the nominees is, in my judgment, irrelevant to that question.

In the case of both schemes, therefore, the shares were issued before C 16 March 1993 within the meaning of s 299A of the Taxes Act.

Application allowed, with costs.

D

The Crown's appeals were heard in the Court of Appeal (Dillon, Mann and Hirst L.JJ.) on 24 and 25 November 1993 when judgment was reserved. On 15 December 1993 judgment was given in favour of the Crown, with costs (Hirst L.J. dissenting).

E *Anthony Grabiner Q.C.*, *Launcelot Henderson* and *Miss Barbara Rich* for the Crown.

Robin Potts Q.C. and *Kevin Prosser* for the Banks and the Companies.

The following case was cited in argument in addition to the cases F referred to in the judgment:—*In re Compania de Electricidad de la Provincia de Buenos Aires Ltd.* [1980] Ch 146; [1978] 3 All ER 668.

G **Dillon L.J.**:—The Court has before it expedited appeals by the Commissioners of Inland Revenue against the Orders made by Rattee J. on 30 July 1993 in two cases which he had heard together. In the one case, the Respondents to the appeal are National Westminster Bank plc and a company called Homeshare (UK) 1 plc; in the other, the Respondents are Barclays Bank plc and a company called Gracechurch BES No. 1 plc. The issue on both appeals is the same, which is not surprising since the appeals H involve virtually identical tax schemes for which the documents were prepared by the same firm of solicitors.

The relevant field of tax law is that of relief for investment in business expansion schemes ("BES") under s 289 of the Income and Corporation Taxes Act 1988, as extended by s 50 of the Finance Act 1988.

I

The opening words of subs (1) of s 289 provide that "... this Chapter has effect for affording relief from income tax where an individual who qualifies for the relief subscribes for eligible shares in a qualifying company" and "*those shares are issued to him*" after certain dates for the purpose of raising money for one or other of the objects specified in subparas (a) to (d) of

subs (1). Those objects were extended by s 50 of the Finance Act 1988 to include, as qualifying purposes, the provision and maintenance of dwelling-houses let or intended to be let on qualifying tenancies. In fact, both these appeals are concerned with cases under the extension by s 50 rather than under subparas (a) to (d) of subs (1) of s 289, but nothing turns on that. The key words in the section are those which I have underlined above "... those shares are issued to him".

It seems that, though the original intention of the BES may have been to induce business expansion by offering investors who pay tax at the higher rate tax relief on the money invested in qualifying companies for the purpose of raising money for the specified objects which were different aspects of business expansion, financiers and their advisers soon developed schemes which, by exit arrangements, would have the effect that financiers would invest to obtain the relief from income tax referred to in s 289 without running any risk of losing their investments if the qualifying company in whose shares they had nominally invested failed to prosper or expand. This was achieved in particular by the exit arrangement or device of having a bank offer the investor a loan on the basis that the loan would be charged on the shares issued to the investor under the BES and would only be recoverable out of those shares without personal recourse against the investor personally. In effect, therefore, what had been an idea to promote business expansion came to provide vehicles for financial manipulation in order that higher rate taxpayers could, without risk to themselves, make a profit at the expense of the Commissioners of Inland Revenue.

Not surprisingly this development was not acceptable to the Inland Revenue, and to counter it, by s 111 of the Finance Act 1993 there was introduced into the Income and Corporation Taxes Act 1988 a new s 299A which provides by subs (1) as follows:—

> "**299A**.—(1) An individual shall not be entitled to relief in respect of any shares in a company issued on or after 16th March 1993 if—
>
> (*a*) there is a loan made by any person, at any time in the relevant period, to that individual or any associate of his; and
>
> (*b*) the loan is one which would not have been made, or would not have been made on the same terms, if that individual had not subscribed for those shares or had not been proposing to do so."

16 March 1993 was a Tuesday and was, in fact, Budget Day.

The question that arises on these appeals is thus simply whether the shares in the qualifying companies "issued" under these schemes sponsored by National Westminster Bank and Barclays Bank were "issued" before 16 March 1993. That raises the somewhat fundamental questions, what is meant by the issue of a share, and at what point of time is the share issued?

It is well known that subscribers' shares are deemed to have been issued at the date of the registration of the company. With bearer shares it may be that the share is not issued until the share warrant to bearer is issued and placed in the hands of the first bearer.

We are not concerned, however, with those categories. We are only concerned with shares registrable in the company's register of members

and thereafter transferable only by written transfer in accordance with the company's articles.

It is the contention of the Revenue that such a share is "issued" when it is first entered in the register of members of the company as held by its first holder. Before that, there may have been a contract by the company to issue the share to a particular person, but the share will not have been issued.

It is the contention of the Respondents, which the Judge accepted, that the share is "issued" when a person becomes absolutely and unconditionally entitled to it. He is then entitled to be registered, and the registration is merely the recognition, and evidence (albeit rebuttable), of his previous title.

Before exploring the issues of law, I should set out the facts, and I will take first the scheme sponsored by the National Westminster Bank.

In January 1993 5 BES companies were incorporated which are called Homeshare (UK) I to V plc.

On 2 March the five Homeshare companies, whose share capitals had been reorganised appropriately on the previous day, issued a prospectus of an offer for subscription under the business expansion scheme sponsored by National Westminster Bank and Hambros Bank (which was the receiving bank) of separate issues by the Homeshare companies of up to 25m ordinary shares of 50p each at £1 per share payable in full on application.

The form of application to be signed by any applicant offered to subscribe for the chosen number of fully paid ordinary shares in the capital of any Homeshare company selected by the directors, and also irrevocably requested and authorised the Homeshare companies, the National Westminster Bank and Hambros Bank and NatWest Nominees Ltd. ("the nominee company") to register any shares for which the application was accepted in the name of the nominee company, which was to send a certificate of beneficial ownership of such shares in due course. Various terms and conditions of the application were set out on the back of the application form, and, under the terms of the prospectus acceptance of an application, was to constitute the making of an agreement in respect of the shares between the nominee company and the investor on terms set out in the prospectus.

The use of a nominee company does not affect the validity of the scheme as a BES, since s 311(1) of the Income and Corporation Taxes Act 1988 provides that "... shares subscribed for, issued to, held by or disposed of for an individual by a nominee shall be treated for the purposes of this Chapter as subscribed for, issued to, held by or disposed of by that individual".

But that does mean that there was never any intention that shares in a Homeshare company should be issued to the investors as opposed to the nominee company.

The offer in the prospectus was fully subscribed by 10 March. The investors' cheques were paid into a designated account as required by the prospectus, and at a meeting on 12 March, the Friday before Budget Day, the directors of the Homeshare companies allotted the shares in all five such companies as between the successful investors. Unsuccessful investors had

their cheques returned to them, subject to reserving a small amount in case successful investors' cheques were dishonoured on presentation. A

Also, on 12 March, letters were sent to the successful investors by Hambros Bank telling them that shares had been allotted to them to the full amount applied for and that they would receive certificates of beneficial ownership in respect of the investment within 28 days. The letters did not condescend to tell the investors which Homeshare company they were to be the beneficial shareholders in. No doubt, in a purely financial scheme of this nature, that was a matter of supreme indifference to all. B

The shares in the Homeshare companies were registered in the name of the nominee company on 2 April 1993, and on the same day the funds subscribed for the Homeshare offer were transferred to the credit of the individual Homeshare companies. Sometime later, shares allocated to investors whose cheques were dishonoured were forfeited under the terms of the Homeshare companies' articles, and reallocated to other investors; this is not of significance for present purposes. C

D

On that chronology, the clear message, in my judgment, is that completion of the issue of the shares took place on 2 April when the shares subscribed for were registered and the subscription moneys were released to the Homeshare companies.

The facts in relation to the scheme sponsored by Barclays Bank were very similar. The 5 BES companies were the five Gracechurch BES companies numbers I to V instead of the five Homeshare companies, and there was no independent receiving bank. The prospectus for the scheme was sent out, in similar terms, on 26 February and the offer was fully subscribed on 3 March. The nominee was, obviously, a Barclays and not a National Westminster Bank nominee company; it was Barclays Nominees (Branches) Ltd. E F

There are two differences of possible substance. The first is that the funds subscribed for the Gracechurch offer were transferred to accounts in the names of the individual Gracechurch companies on 11 March 1993, although the shares in the Gracechurch companies were not registered in the name of the Barclays nominee company until 2 April. G

The second is that the letter of acceptance to successful investors was sent on 4 March 1993, which was before any allotment of shares in the five Gracechurch companies, and thus before it was known to which of the five Gracechurch companies the investor's subscription would be allocated. The allotment only took place on 10 March, and there was no further relevant communication to the successful investors before 16 March. H

So far as the law is concerned, the reported cases do not speak clearly, and none decides the precise question. On the contrary, there are numerous statements of high authority to the effect that the meaning of the word "issue" in relation to shares depends on the context in which the word is used.

I

Reference to the Companies Act 1985, or previous Acts, to discover the function of a company's register of members is not very helpful, because the answer is circular. Section 352 of the Companies Act 1985, which currently imposes on companies the duty to keep a register of members, requires that there be entered in the register (a) the names and addresses of the members and (b) the date on which each person was registered as a member. But s 22

A of the same Act defines the term "member" as comprising apart from the subscribers "... every other person who agrees to become a member of the company and whose name is entered in its register of members".

There are, however, two points to be noted on those two sections.

B The first is that the register has to show not merely the names and addresses of the members but also the date on which each person was registered as a member—not the date on which that person became entitled to be registered as a member. That suggests to my mind that the register is intended to provide a record of the holding of shares in the company and that, for that purpose, the crucial date is the date on which the name C is entered in the register. Mr. Potts submits, however, that the register of members is merely a record of membership which carries voting rights, and that being a shareholder is different from being a member in, that though a person cannot be a member before his name is entered in the register, he can be a shareholder, as that is a different concept which merely involves the issue or transfer of shares to him without registration. I do not agree.

D The second point is that it is basic to the concept of becoming a member of a company, or a shareholder if that is a different concept, that the person concerned must have agreed to take the shares, in respect of which he is registered. That is a statement of the obvious, when it is remembered that shares can be issued nil paid or only partly paid. But it is illustrated by the E case of *Central Piggery Co. Ltd.* v. *McNicoll* (1949) 78 CLR 594. In that case, two individuals had applied to be issued with shares in a company. The company resolved to issue the shares to them and, in fact, entered their names in the register. But there was, at that stage, no communication to the applicants of these facts. It was, consequently, held that, at that stage, there had been no issue of the shares to the applicants. Some days later share certificates were sent to the applicants, but that came too late because, in the F meantime, they had entered the employment of the company and there were statutory provisions which banned the issue of shares in a company to employees of the company. Dixon J. said, at page 600:—

> "In the present case it is clear that neither McNicoll nor Hurst had become parties to a binding contract before 5th October. There had G been no communication to either of them accepting their offers and there could be no contract until there was an acceptance. They were not masters of their shares and were in the position that they could repudiate ... The transaction was inchoate and did not become effective until there was a communication of the acceptance. On communication there was a culmination of the process and the shares were issued. They H were in fact not issued until 16th October in the case of McNicoll and 19th October in the case of Hurst."

That was, of course, said against the background that the shares had been registered in the applicants' names before they became employees, and the later communication of acceptance of their applications was the sending I to them of their share certificates.

Certain points are, however, common ground between the parties.

The first is that where there have been an offer and an acceptance—whether an offer by an investor to subscribe for shares which is accepted by the company or an offer by the company to issue shares which is accepted by

the investor,—and the investor is registered in the register of members as the holder of the shares, the shares will have been issued. That was decided in *Re Heaton's Steel and Iron Co. (Blyth's Case)* (1876) 4 ChD 140 (where the point the Court was concerned to make was that it was not necessary to wait beyond registration for the issue of the certificate for there to be an issue of the shares). In *Attorney-General* v. *Regent's Canal and Dock Co.* [1904] 1 KB 263, at 270, Cozens Hardy L.J. said :—

> "It is true that in certain cases no certificate by the company is necessary to constitute an issue, and *Heaton's Steel and Iron Co* was cited, but in that very case it was held that there was an issue of shares when the company had inserted the name of the shareholder on the register."

In those cases there was no conflict over whether the date of issue was the date of the entry on the register of the name of the investor after there had been an offer and acceptance, or whether it was the date of the communication to the offeror of the acceptance of the offer which constituted the contract which gave the investor the right to be registered.

The second point which is common ground is that, if in response to an investor's application, the company issues to the investor a letter of allotment which is merely conditional, then so long at any rate as the letter of allotment remains conditional, there is no issue of the shares. See *Spitzel* v. *The Chinese Corporation Ltd.* (1899) 80 LT 347 where Stirling J. defined "allotment" as being an appropriation by the directors or the managing body of the company of shares to a particular person.

The third and more important point is that it was held by this Court, affirming Finlay J. in *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134, that, where a company sends to an applicant for shares a renounceable letter of allotment, that does not amount, at that stage, to an issue of the shares to the applicant.

That case arose in the context of a claim to exemption from stamp duty on a company reconstruction under s 55 of the Finance Act 1927. The position was that the undertaking of an old company had been sold to a new company by way of reconstruction as envisaged by the section, and the condition for the exemption which was in issue was a condition which required that not less than 90 per cent. of the shares in the new company should have been issued to the holders of the shares in the old company. What actually happened was that the new company sent renounceable letters of allotment to the shareholders in the old company in proportion to their shareholdings in the old company, but more than 10 per cent. of the shares thus allotted were renounced by the allottees in favour of third parties who had never held shares in the old company. It was submitted that the exemption was available because the letters of allotment, albeit renounceable, gave the allottees the right, as against the new company, to be put on the register as the holders of the shares and any renunciation in favour of third parties was a disposition by the allottee, of his own choice, of the shares issued to him. But that submission was rejected and it was held that the condition of the exemption was not satisfied.

Lord Hanworth M.R. said, at 156:—

> "I come to the conclusion that the meaning of the word 'issue' is something more than the mere giving of an allotment letter to an old

A shareholder enabling him to deal with the shares offered to him at his volition. It must connote, as indicated by Sir Alexander Cockburn"—in *Clarke's Case* (1878) 8 Ch D 635 at 638—"a later stage; and the test has to be applied whether the shares ultimately belong to some person who was the holder of shares in the old company, so that the identity of the old corporators and the new corporators is maintained."

B

Slesser L.J. said, at 157:—

> "I think there is contemplated ... a continuity of personality and that the word 'issue' means such an issue as effectually makes the shareholder in the new company a beneficial owner and not merely a C person with an equitable right to call upon the company subsequently to register him as a beneficial owner, as would be the case if the mere allotment in itself, accompanied by a form of renunciation, were to be the same as 'issue'."

Romer L.J. said, on the same page:—

D

> "I cannot read this section without seeing that, whatever the word 'issue' may mean in other collocations, here it is equivalent to the creation of a registered shareholder; that is to say, that by the issue of the shares to the shareholders of the old company is meant that which makes the shareholders in the old company become shareholders in the new company."

E

By "shareholders" in the new company, he must have meant members.

Romer L.J. referred also a little further down to the shareholders of the old company, instead of becoming shareholders in the new company, F being expressly given, by the letters of allotment, the power of not becoming members, but of selling their shares to other people who so become members in their stead.

That case was expressly decided on the meaning of the word "issue" in s 55 of the Finance Act 1927. But, in my judgment, the reasoning must G equally apply where there are renounceable letters of allotment apart from any company reconstruction. If there is an issue of shares by a company the corollary must be that there is an identifiable person to whom the shares have been issued. But I find great difficulty in the concept that, by sending a renounceable letter of allotment to an applicant, the company is issuing shares to him while, at the same time, holding out to him a facility for H disposing of those shares without paying stamp duty (as on a transfer) so that he will never appear on the register as a member. I prefer the views of Slesser and Romer L.JJ. that, by sending an applicant a renounceable letter of allotment, the company grants the applicant a chose in action, a right to have the shares issued to him. He can transfer that right to someone else by renunciation. But the issue of the shares only comes when the I original allottee, if he has not renounced the right, or a successor in title by renunciation or successive renunciations, applies to be put on the register and is put on it. If that analysis is correct, I do not see why the analysis should not in principle be the same where the letter of allotment is not expressed to be renounceable; the letter of allotment grants a chose in action, the right to have the shares issued to him, but the issue only comes when he is entered in the register as the holder of the shares. That gives due significance to the

statutory requirement that the date of registration of each person registered must be entered in the register of members.

A

I have already referred to Lord Hanworth's reference to Sir Alexander Cockburn. What Sir Alexander actually said in *Clarke's Case,* at page 638, was:—

B

> "I think that, inasmuch as the term 'issue' is used, it must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete."

C

In the same case Cotton L.J. said, at the foot of page 641:—

> "Although no certificates have been issued, yet the transaction is complete—the allottee has become complete master of the shares, and a mere failure to perform the formal act of issuing the certificates does not prevent the shares from being issued within the meaning of the section."

D

That would seem to be the source from which Dixon J. took his phrase "... they were not masters of their shares".

E

What was said in *Clarke's Case* was paraphrased in *Agricultural Mortgage Corporation Ltd.* v. *Inland Revenue Commissioners* [1978] Ch 72 (a case to do with loan capital and not share capital) as requiring something to recognise the rights of and perfect the title of the lender. See *per* Goff L.J., at 101D and G, and *per* Buckley L.J., at 107H.

F

What completes or perfects the title of an allottee of shares, is, in my judgment, registration or the issue of a certificate and nothing short of that.

Where, however, registration has taken place, the subsequent issue of a certificate is a mere formality. Superficially in the present case the registration of the shares in the banks' BES companies in the names of the banks' nominee companies looks like a mere formality, and it looks as if the substance is recognition of the beneficial or equitable titles of the investors. But that is not a correct analysis because of s 311 of the Income and Corporation Taxes Act 1988. The registration of the nominee companies is as important and significant as the registration of the investors themselves would be if there were no nominee companies involved.

G

H

Mr. Potts submits that the shares are issued when the allottee has an unconditional right to be registered in respect of the shares and (in order to distinguish the cases where there have been renounceable letters of allotment) the company has an unconditional right to require the allottee, and not anyone else, to be registered as the holder of those shares.

I

If that is correct, it would follow in every case of an issue of new shares that the shares are issued before any one is registered as a member in respect of them, because in every case there will before registration have been an agreement by offer and acceptance between the company and the investor for the one to issue and the other to take the shares. Even with renounceable letters of allotment a time will come when the letters have to be lodged for

A registration and can no longer be renounced, and by lodging the letter of allotment for registration the allottee or his successor will be abandoning any further right of renunciation.

I see no virtue as a matter of company law in Mr. Potts' submission —except of course for his clients and the investors in the BES companies if B they can thereby establish that their shares were issued to the nominee companies before the deadline of 16 March.

In the course of argument, we were referred by Mr. Grabiner Q.C., for the Revenue, to a statement of Lord Sands in the First Division of the Court of Session in *Commissioners of Inland Revenue* v. *Wilson*[1] 13 TC 789, at 795, C that the register of the company is the document of title of a shareholder to his shares. He had earlier referred to the fact that the register of members of a company is open to public inspection. I do not attach any importance to these statements made in the context of that case, where the question was whether there had been an effective gift of shares by a father directing that the shares be registered in the name of his infant son. *Re Rose* [1952] Ch 499 D shows that there can be a completed gift of shares by transfer even before the transfer is registered; the question is different.

Conversely, in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*[2] [1979] 1 WLR 974, Templeman L.J. commented, at 984H, in relation to a E submission that in that case there was no register of loan stock, that a register of loan stock was only a record of the identity of lenders and their assignees. It does not, in my judgment, follow from that that the statutory register of members is only a record of the identity of members and registration cannot amount to the issue of the new shares in question to the person who is being registered as a member in respect of them.

F

Finally, I should come to the question of unauthorised reduction of capital. It is said by Mr. Potts that, where there has been an agreement between a company and an investor that one will issue and the other will take certain shares, the parties cannot cancel that agreement, before registration takes place, because that would involve an unauthorised G reduction of capital. It is, therefore, submitted that that shows that, where there is such an agreement, the shares to which it relates are issued share capital, and must have been "issued" at the moment when the agreement was made by the usual process of offer and acceptance. Reference was made to *Merchant Credit Private Ltd.* v. *Industrial and Commercial Realty Co. Ltd.* (1983) 7 ACLR 711. Although the report is Australian, that was a decision of H the Privy Council on an appeal from Singapore, and the Judicial Committee seems to have followed the English decision of this Court in *Re Cheshire Banking Co.* (1886) 32 ChD 301, and especially an observation of Fry L.J., at 311, that the company had no right to rescind a concluded contract for the allotment of shares.

I So far as English law is concerned, what a company can, or cannot, do with its share capital issued or unissued, is governed by statute and depends on the construction of the statute. The present statutory provision is s 121 of the Companies Act 1985 which provides, so far as material, that, without

(1) 1927 SC 733. (2) 54 TC 101.

constituting a reduction of share capital which would require the sanction of the Court under s 135, a company may do various things, including "(e) cancel shares which, at the date of the passing of the resolution to cancel them have not been taken or agreed to be taken by any person and diminish the amount of the company's share capital by the amount of the shares so cancelled".

This is reproduced in the same terms as s 41 in the Companies (Consolidation) Act 1908 and it likewise appeared in the Consolidation Acts of 1929 and 1948. Its origin is s 5 of the Companies Act 1877 which was in force at the time of the decision in *Re Cheshire Banking Co.* and was, no doubt, what Fry L.J. had in mind in that case.

I do not see that it follows in the least that, because this power has stood for so long as a statutory power of a company to rearrange its share capital by resolution without having to apply to the Court to sanction a reduction of capital, therefore, the term "issued shares" must be regarded as shorthand for or a reference to the formula "shares which have been taken or agreed to be taken by any person". Parliament is concerned that the capital which would be paid up on shares agreed to be taken by an investor should be available for the creditors. But that does not bear on the question of the precise date on which shares are issued. Indeed, the natural conclusion would be that the shares which have been "taken" are the shares which have been issued, and the shares which have been "agreed to be taken" are shares which have been agreed to be issued but have not yet been issued.

For these reasons, I, for my part, would allow this appeal and would declare that the shares in the BES companies were not issued until after 16 March 1993.

Mann L.J.:—I have had the advantage of reading in draft the judgment of Dillon L.J. I am in entire agreement with it and do not wish to obscure the analysis with any words of my own save these. In a taxing statute it is appropriate that a certain moment can be found and here the certain moment must be that of registration.

I would allow this appeal and declare that the shares in the BES companies were not issued until after 16 March 1993.

Hirst L.J.:— I gratefully adopt Dillon L.J.'s recital of the facts and his exposition of the statutory background to the BES scheme.

The sole question for decision in this case is whether for the purpose of s 299A of the Income and Corporation Taxes Act 1988 the issue of shares is complete only after registration (as the Revenue contend), or (as the banks contend and the learned Judge held), it is sufficient once there is a binding contract between the taxpayer and the bank, and also once an allotment of the shares has taken place, in whichever order the two events occur (hereinafter called "the date of investment").

The authorities which have been cited clearly lay down two principles governing the construction of the word "issue":—

(a) The word has no fixed meaning but, as stated by Harman J. in *Holmleigh (Holdings) Ltd.* v. *Commissioners of Inland Revenue* 46 TC 435, at

A page 453, "changes its meaning in accordance with the context in which it is found".

(b) The word is a mercantile expression and not a technical term (*Agricultural Mortgage Corporation Ltd.* v. *Inland Revenue Commissioners* [1978] Ch 72, at page 101, *per* Goff L.J. and, at page 106, *per* Scarman L.J.).

B

It is, therefore, essential at the outset both to consider the statutory context, and also to identify the salient features of the BES scheme which form the mercantile context in which the word is used.

Mr. Potts was able to point to a number of significant provisions in C Chapter III of Part VII of the Income and Corporation Taxes Act 1988 (where the provisions concerning tax relief for BES investments are consolidated) which seem to me, for the reasons given below, either to support or at least to be fully consistent with his construction.

(1) Section 289(1)(a)–(d), which contain the main enactment of the relief, D require shares to be issued for the purpose of "... raising money for a qualifying trade or other qualifying activity"; thus issue is equated with the raising of money which occurs at the same time as the taxpayer makes his investment (compare also ss 290A and 296).

(2) Sections 289(1)(b)(i), (c)(i) and (d)(ii) all refer to what the company E does "immediately thereafter" i.e. immediately after issue. These provisions would seem to assume that shares are issued at the time the money is raised and do not envisage formalities such as registration.

(3) Section 289(1)(a) gave BES relief initially in respect of shares issued after 5 April 1983; likewise, s 289(1)(b)(i) gave relief for research and develop- F ment activities where the shares were issued after 18 March 1986 (Budget Day). It would be anomalous if relief were to be available for investments made in companies before those dates just because registration had been delayed and occurred thereafter.

G (4) Various conditions have to be satisfied by the company during "the relevant period" of three years beginning with the date on which the shares were issued (e.g. ss 289(12)(b), 290A, 293, 294, 297, 308 and 309). Thus, for example, the company must exist wholly or substantially wholly for the purpose of carrying on a qualifying trade (s 293(2)(a)). It would be extraordinary if the fact that a company failed to comply with one or more of these conditions after the date of investment could be ignored merely H because registration was delayed, deliberately or otherwise.

(5) Section 294 imposes a condition that the value of interest in land held by the company must not be greater than half the value of its assets as a whole, and for this purpose the interests in land are valued at the lower of their value at any time in the relevant period and their value "... immedi- I ately after the issue of the shares" (s 294(1)(b)). It would be anomalous if a taxpayer was denied relief because the value of the company's land increased between the date of investment and the date of registration.

(6) Section 294(3) provides that the value of the company's assets as a whole shall be arrived at by aggregating the market value of the assets and

then deducting the amount of its debts and liabilities, and s 294(4) provides for this purpose that the amount paid up in respect of those shares of a company (if any) which carry a present or future preferential right to the company's assets on its winding-up shall be treated as a debt of the company but otherwise a company's "share capital, share premium account and reserves" shall not be treated as debts or liabilities. It would be strange if the value at a particular time of the company's assets could be affected one way or another by whether or not an entry had been made at that time in the register of members.

(7) Various conditions also have to be satisfied by the individual taxpayer during a different "relevant period", beginning with the date of incorporation of the company (or, if the company was incorporated more than two years before the date of issue of the shares, beginning two years before that date) and ending five years after the issue of the shares (see e.g. s 289(12)(a) and ss 291, 299, 299A, 300, 302 and 303). For example, the taxpayer must not, at any time in the relevant period, be connected with or control the company (s 291) or receive any value from the company (s 300). It would seem consistent with the scheme of the Act that these conditions should apply from the date of investment and not by reference to the date of registration.

(8) Various other conditions have to be satisfied by the taxpayer at the time when the shares are issued to him e.g. by s 291(1)(d) he is required to be resident and ordinarily resident in the United Kingdom at the time when they were issued. Here again it would seem to make good sense that this requirement should apply at the date of investment rather than at the date of registration over which he has no control.

(9) Finally, without wishing to overload this judgment by a complex citation of intricate amending legislation referred to by Mr. Potts, it is apparent that, if the construction favoured by the Revenue is right, the draftsman of Sch 29 of the 1988 Act (dealing with capital gains tax) must inadvertently have taken away in a consolidating statute an exemption which was previously given, since the date of issue of shares would be different for BES and capital gains tax purposes.

Mr. Grabiner did not contradict this part of Mr. Potts' submissions, nor did he point to any other sections in this part of the Act supporting his construction.

So far as the mercantile context is concerned, the following points seem to me to be significant:—

(A) It is common ground that the whole purpose of the scheme is for the taxpayer to obtain, and for the promoter to provide, on carefully defined terms, a tax shelter for monies subscribed by the taxpayer, up to the statutory limit, as an incentive for investment in qualifying classes of enterprise. In the years following the inception of the scheme in 1983, legislative changes rendered it increasingly favourable to taxpayers, both through the extension of the range of permitted investments to include *inter alia* certain types of tenancy (with greatly reduced risk of loss to the taxpayer), and through the exemption of gains from capital gains tax (Finance Acts 1988 and 1986 respectively).

A It was, of course, the former change which, inadvertently, paved the way for loan schemes like the present, since the lender was assured adequate security.

(B) As Mr. Potts rightly submitted, once a binding contract is entered into and allotment has taken place (in whichever order), all the essential business features of the transaction have been fulfilled so far as both the B taxpayer and the bank are concerned, and without question the taxpayer at that juncture has made his investment and acquired a beneficial title to the shares. Registration is a mere formality so far as both sides are concerned; it is of no concern to either whether or not the taxpayer's title to the shares is a strictly legal one so long as it is a beneficial one; membership and the right to vote which accompany registration are of little or no interest to either side in C the BES context; nor is the taxpayer interested in the right to confer a legal title on a transferee, since the whole crux of the scheme is that he must hold on to his shares for the whole of the five-year period in order to attract tax relief; indeed, for all practical purposes, the act of registration here could hardly be more of a mere formality in that (apart from the original subscribers and any director-shareholders), there will only be one entry (the D bank nominee) in the case of each BES company's register.

(C) Mr. Grabiner, on the other hand, submitted that there is, none the less, a significant mercantile purpose in registration in that it enables a precise date to be fixed for the date of issue, which is the starting point of the five-year period. I am unable to accept this submission. The burden is on the E taxpayer to establish that the shares have been duly issued in order to entitle him to tax relief, and he would normally have no difficulty whatsoever in proving a precise date either by reference to the bank's letter of acceptance (or confirmation) of his application, and by reference to the allotment, whichever is the later. If he fails, it is he and not the Revenue who is the loser.

F (D) If registration were the criterion, then the taxpayer's eligibility to relief (as in the present case), or in the normal case the tax year in which relief would be available, would depend on an administrative act entirely outside his control. This could be of critical importance if his taxable income fluctuated from year to year, with the consequence that relief which would be valuable in one year would be of little or no consequence in another.

G

It thus seems to me that the statutory context and the mercantile context of the scheme both point very strongly in favour of the construction advanced by Mr. Potts, and upheld by the Judge, unless the authorities compel a contrary conclusion.

H Mr. Grabiner submits that his construction is the orthodox approach and, in support of this, he cites several authorities already referred to by Dillon L.J. In my judgment, none of these cases establishes the proposition for which Mr. Grabiner contends.

I *Clarke's Case* (1878) 8 ChD 635 is, in my judgment, authority for no more than that allotment *per se* does not constitute issue, which is not in dispute in the present case; nowhere in the judgments is it stated that registration is a prerequisite for issue, as it so easily could have been as a very short answer to the problem, if it was correct. Cockburn L.C.J., at page 638, clearly envisaged the need for "some other step" beyond allotment, without specifying that it must be registration. James L.J. at the opening of

his judgment, on page 639, seems clearly to envisage a binding contract as the touchstone when he stated that "... nothing had occurred by virtue of which the company could have said to the shareholder 'you are bound to take the shares from me' nor anything by virtue of which the shareholder could have said 'I have become a shareholder in your company' ". Cotton L.J., at page 640, stressed the absence in *Clarke's Case* of a binding contract precluding the shareholders from cancelling the issue. Thesiger L.J., at page 642, stressed the importance of looking at all the circumstances of the individual case "practically and substantially", and laid down no firm rule for the construction of the word.

In relation to both *Clarke's Case* and *Tillotson's* case (*infra*) Mr. Grabiner placed great stress on the references to the need for the shareholder to be "master of the shares" (e.g. *per* Cotton L.J., at page 641) and for him to secure his title to the shares, submitting that the latter concept must connote a legal title. I do not agree. In my judgment, the beneficial owner of shares is the master of those shares even though they are not registered, since he has a statutory right to registration under s 359(1)(a) of the Companies Act 1985. Moreover, it is implicit in Mr. Grabiner's argument that registration *confers* upon the shareholder a title to the shares, rather than merely *recording* his title; but, in my judgment, the latter is the better view (compare the statement of Templeman L.J., with which Scarman L.J. and Ormrod L.J. agreed, in *W. T. Ramsay Ltd.* v. *Inland Revenue Commissioners*[1] [1979] 1 WLR 974, at page 984, that, in the case of registered loan stock, "... registration is only a record of the identity of the lender ..."). Such a record is, of course, essential for membership and voting purposes. *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134 is another case where, if there was a short and simple answer ("registration or nothing") the case could have been briefly and summarily disposed of. As it is the case is, in my judgment, only authority for the proposition, not disputed here, that a renounceable allotment letter is not *per se* an issue since, as Finlay J. stated, at page 151, all the company is saying to the shareholder is "... do you want (the shares) or do you prefer somebody else should have them...?"

At page 155, Finlay J. kept open the possibility that registration is unnecessary, as did Lord Hanworth M.R., at page 155. Slesser L.J., at page 157, lays down that the requirement that the shareholder must be the beneficial owner, for which, for reasons I have already given, I do not think registration is a prerequisite.

The *Agricultural Mortgage Corporation* case (*supra*), far from supporting Mr. Grabiner's arguments, tells the opposite way, though, as Mr. Potts fairly pointed out, not conclusively since it concerns a loan and not an issue of shares. However, all three judgments are couched in fairly general terms, and there are references to some of the earlier cases cited above. Goff L.J. clearly left open the possibility, at page 101, that a letter of acceptance coupled with allotment may suffice; Scarman L.J., at page 105, stated in terms that "... issue consists of the acceptance of the loan or loans upon the terms offered"; and Buckley L.J., at page 108, stated the requirement that something should be done by the body issuing or proposing to issue the loan capital "... which demonstrates the acceptance by that body of an offer by the other party to participate in the transaction".

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(1) 54 TC 101.

A Thus, in my judgment, nothing in the cases cited by Mr. Grabiner compels a contrary conclusion to the construction which I favour in the context of the BES scheme.

On the other hand, there are, in my judgment, a number of other considerations advanced by Mr. Potts which lend significant support to his B construction, in addition to the passages I have already cited.

In *Merchant Credit Private Ltd.* v. *Industrial and Commercial Realty Co. Ltd.* (1983) 7 ACLR 711 the Privy Council held that, once a contract for shares is in existence, it cannot be rescinded because, in the words of Lord Templeman giving the judgment of the Board, at page 717, "... an illegal C reduction of capital would thereby be involved". It is, in my judgment, difficult to see how this doctrine works unless the shares in question had been issued, not least because, as Mr. Potts pointed out, the company's balance sheet would otherwise become unbalanced.

In *McEuen* v. *West London Wharves and Warehouses Co.* (1871) D 6 Ch App 655 it was held that, once a shareholder had responded to a prospectus containing a form of application for shares in a letter corresponding with that form, and an answer was sent to him allotting him those shares, "... he has done everything, and the company has done everything, which was necessary to make him a complete shareholder". (*per* Sir William James L.J., at page 661); Sir George Mellish L.J. reached a conclu- E sion to the like effect, at page 663. It is true, as Mr. Grabiner pointed out, that the shares had also been registered but it is quite clear that neither of those two eminent Judges regarded registration, as opposed to the facts cited in the above quotation, as the key.

A like conclusion was reached by Stirling J. in *Spitzel* v. *The Chinese* F *Corporation Ltd.* (1899) 80 LT 347, at page 351, where he stated that "... the allotment may be, and probably is, such as to give a title to the shares the moment the allottee communicates the acceptance of it to the company whose directors make the allotment".

In *Central Piggery Co. Ltd.* v. *McNicoll* (1949) 78 CLR 594 in the High G Court of Australia the question arose as to the date at which certain shares were issued in relation to contracts of service. In the most extensive of the three judgments Dixon J. considered a number of the English cases, including the *Spitzel* case and *Clarke's Case*, and held, at page 600, that there had been no acceptance by the critical date because "... there had been no communication to either of (the shareholders) accepting their offers and there could be H no contract until there was an acceptance. They were not masters of their shares and were in the position that they could repudiate. When they became the servants of the company the transaction was inchoate and did not become effective until there was a communication of the acceptance. On communication there was a culmination of the process and the shares were issued".

I

Latham L.J. and Rich J. delivered concurring judgments.

Since, in that case the shares had been registered, Mr. Grabiner invited us to interpret Dixon J.'s judgment as being inapplicable to the present situation, but, in my judgment, it is quite clear that he is treating a binding

contract combined with allotment as constituting issue, and that, in consequence, this case is strong persuasive authority in favour of Mr. Potts' submission, and perhaps the most nearly in point of all the authorities cited to us. A

Mr. Potts also cited to us the current English text books on company law, and pointed out that, with one exception, none of them supported Mr. Grabiner's contention and most of them were in conflict with it, which may throw some light on the orthodox meaning. B

In *Buckley on the Companies Acts* (14th Edition 1981) page 147, it is stated that issue depends on "... whether the shareholder has or has not been put completely in possession of his share, and this may be so, although some formal act may not have been completed". C

Pennington on Company Law (6th Edition 1990) page 311, states in terms that "... the issue of securities occurs when the company sends a document to the subscriber indicating that the securities have been allotted to him and evidencing his title to them". D

Palmers' Company Law (25th Edition 1992) para 4.003 states that the issued capital represents "... the shares which have actually been taken up by shareholders who have agreed to give consideration in cash or kind for the shares issued to them". E

Halsbury's Laws (4th Edition Volume 7(1)) para 170 states that shares which are properly allotted are part of the issued capital; however, at para 425, in the only textbook passage which gives any support to Mr. Grabiner's argument, it is stated that shares have been issued "... when a person who has agreed to take shares is entered on the register"; however, the strength of this latter passage is somewhat diminished by the footnote which states that it would seem that the meaning of issue depends on the context of the enactment in which the word occurs, and that the term is not a technical but a mercantile term. F

Of course, I fully recognise that registration is evidence of issue, and that, once the shares have been registered, in the absence of exceptional circumstances, there is clear proof that they have been issued. But for all the reasons I have given, I do not think that the converse applies in this particular context, whatever may be the position in other contexts. G

Towards the conclusion of his judgment, at page 650G, Rattee J. stated that[1] "It makes perfectly good sense that the availability of the relief should depend on a situation having arisen in which each party is irrevocably bound, on the part of the company, to complete these formalities and, on the part of the taxpayer, to submit to their completion". I am in full agreement with this conclusion which, I think, applies the correct test, namely, a practical approach in the particular mercantile context in which the word issue presently appears. H I

I would, therefore, dismiss this appeal.

Appeals allowed, with costs.

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(1) Page 14I *ante*.

A The appeals of the banks and the companies were heard in the House of Lords (Lords Templeman, Jauncey of Tullichettle, Slynn of Hadley, Woolf and Lloyd of Berwick) on 7, 8 and 9 March 1994 when judgment was reserved. On 23 June 1994 judgment was given in favour of the Crown (Lords Jauncey of Tullichettle and Woolf dissenting).

B *Sydney Kentridge Q.C.*, *Robin Potts Q.C.* and *Kevin Prosser* for the Banks and the Companies.

Anthony Grabiner Q.C. and *Launcelot Henderson* for the Crown.

C The following cases were cited in argument in addition to the cases referred to in the judgment:—*Arnison* v. *Smith* (1887) 41 ChD 348; *Attorney-General* v. *Mayor, Aldermen and Citizens of the City of Liverpool* [1902] 1 KB 411; *In re Compania de Electricidad de la Provincia de Buenos Aires Ltd.* [1980] Ch 146; [1978] 3 All ER 668; *Governments Stock and Other Securities Investment Co. Ltd.* v. *Christopher and Others* [1956] 1 WLR 237; [1956] 1 All D ER 490; *Holmleigh (Holdings) Ltd.* v. *Commissioners of Inland Revenue* 46 TC 435; *Commissioners of Inland Revenue* v. *Dowdall O'Mahoney & Co. Ltd.* 33 TC 259; [1952] AC 401; *Kirkness* v. *John Hudson & Co. Ltd.* 36 TC 28; [1955] AC 696; *Mercantile Credit Pte Ltd.* v. *Industrial and Commercial Realty Co. Ltd.* [1983] 7 ACLR 711.

E

Lord Templeman:—My Lords, the question in the present case is when is a share issued?

F A company may invite applications for unissued share capital. If an offer for shares is made, a binding contract to issue shares comes into existence when the applicant is informed that shares have been allotted to him. The applicant is neither a member nor a shareholder while his rights rest in contract and until the issue of the shares has been completed by registration. Every company must maintain a register of members. The register must contain, *inter alia*, the names of the shareholders, an indication of the shares to G which each shareholder is entitled, a statement of the amount paid up on the shares and the date when the entry was made. No notice of any trust, express, implied or constructive, is to be entered on the register. The register is open to inspection by the public. In my opinion, shares are issued when an application has been followed by allotment and notification and completed by entry on the register. Once the shares have been issued, the shareholder is H entitled to a share certificate. The certificate declares to all the world that the person who is named in it is the registered holder of certain shares in the company and that the shares are paid up to the extent therein mentioned. The assertion that shares are not issued until they are registered is now disputed because shares were allotted on 12 March 1993 and registered on 2 April 1993 after tax relief had been modified in respect of shares issued after I 15 March 1993.

In March 1993 the Appellant National Westminster Bank, like other mortgagees, held interests in houses which were worth less than the amount of the secured loans. The provision of dwelling-houses to let was a purpose for which tax relief under a business expansion scheme was obtainable.

By Chapter III of Part VII of the Income and Corporation Taxes Act 1988 ("the taxing statute") maximum tax relief is confined to tax on £40,000 expended by a taxpayer in an investment in shares in a business expansion scheme company. The tax is repayable to the Revenue if the shares are sold within five years.

The bank caused to be incorporated five business expansion scheme companies ("the home share companies") to which the bank intended to convey houses held by the bank. By a prospectus published on 2 March 1993, the home share companies sought applications for 25m shares to be issued at £1 each, payable in full on application not later than 2 April. By the terms of the prospectus the bank offered to lend to each applicant 74 per cent. of the cost of his shares, the loan to be made in September 1993 about the same time as the applicant could expect to recover 40 per cent. of the cost of his investment in shares by way of tax relief. At the end of five years, the bank was bound to offer to purchase the shares of the home share companies at a price sufficient to satisfy the loans made by the bank and accumulated interest. An applicant who invested in shares to the amount of £40,000 and borrowed from the bank would, by September 1993, receive in cash £29,600 from the bank and £16,000 from the Revenue, thus producing for him an immediate profit of £5,600. At the end of five years, the applicant having paid no interest on the loan and the company having paid no dividends, the shares would be purchased by the bank. For their part, the bank would have acquired the shares for 74 per cent. of cost. In the result, the tax relief of £16,000 for each applicant would be lawfully shared between the applicant who would benefit by £5,600 and the bank who would benefit by £10,400. As the law stood at the date of the prospectus, the bank stood to benefit from the "business expansion scheme" by £6,500,000 at the expense of the Revenue.

Applications for 25,000,000 shares were received with payment in full. Applicants were notified that "... shares have been allotted to you to the full amount applied for". By the prospectus each applicant irrevocably appointed NatWest Nominees Ltd. ("the nominee"), a wholly-owned subsidiary of the bank, to act as nominee on behalf of the applicant in respect of shares for which his application was accepted and the applicant also irrevocably authorised and instructed the nominee to accept any offer made by the bank at the end of five years. It was never, therefore, contemplated that the shares would be issued to the applicants but that the shares would be issued to the nominee. Section 311 of the Act of 1988 dealing with business expansion schemes provides that shares issued to a nominee for an individual shall be treated as issued to that individual. The issue required to be completed by registering the nominee as the proprietor of the shares.

The Chancellor of the Exchequer announced amendments to the business enterprise scheme legislation on 16 March 1993. In the result, s 299A of the taxing statute (inserted by s 111 of the Finance Act 1993) provides that:

> "(1) An individual shall not be entitled to relief in respect of any shares in a company issued on or after 16 March 1993 if—
>
> > (*a*) there is a loan made by any person, at any time in the relevant period, to that individual or any associate of his; and
> >
> > (*b*) the loan is one which would not have been made, or would not have been made on the same terms, if that individual had not subscribed for those shares or had not been proposing to do so."

A The amendment was designed to ensure that tax relief only benefited individuals.

The loans from the bank available under the prospectus are admitted to be loans to which s 299A of the taxing statute applies. If the shares for which applications were sought by the prospectus were not issued to the nominee B on behalf of the applicants until 2 April 1993 when the nominee was registered as proprietor of the shares in the registers of the home share companies, an applicant who chooses to borrow from the bank on the terms of the prospectus will not be entitled to tax relief. The shares of each of the home share companies were applied for and allotted by 12 March 1993 but were not registered until 2 April. In these proceedings, the bank argued that C the shares were issued before 16 March 1993.

By s 738 of the Companies Act 1985:

"(1) In relation to an allotment of shares in a company, the shares are to be taken for the purposes of this Act to be allotted when a person D acquires the unconditional right to be included in the company's register of members in respect of those shares."

In the present case, shares were allotted to an applicant after he had made an application accompanied by payment in full, after the directors of the company determined to allot shares to the applicant and as soon as E notice of the allotment was given to the applicant whereupon he acquired the unconditional right for the nominee to be included in the company's register of members in respect of those shares.

By s 22 of the Act of 1985:

F "(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member G of the company."

The nominee did not become a member until registration on 2 April.

By s 352 of the Act of 1985:

H "(1) Every company shall keep a register of its members and enter in it the particulars required by this section.

(2) There shall be entered in the register—

(*a*) the names and addresses of the members;

I (*b*) the date on which each person was registered as a member; and

(*c*) the date at which any person ceased to be a member.

(3) The following applies in the case of a company having a share capital—

(*a*) with the names and addresses of the members there shall be entered a statement— A

(i) of the shares held by each member, distinguishing each share by its number (so long as the share has a number) and, where the company has more than one class of issued shares, by its class, and B

(ii) of the amount paid or agreed to be considered as paid on the shares of each member; ..."

By s 186 of the Act of 1985 as amended:

"(1) A certificate under the common seal of the company ... specifying any shares held by a member is— C

(*a*) in England and Wales, prima facie evidence ... of his title to the shares."

The Act of 1985 preserves the distinction in English law between an enforceable contract for the issue of shares (which contract is constituted by an allotment) and the issue of shares which is completed by registration. Allotment confers a right to be registered. Registration confers title. Without registration, an applicant is not the holder of a share or a member of the company; the share has not been issued to him. D

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The allotment of a share, followed by the registration of the shareholder followed by the furnishing of a share certificate may take place on the same day or on different days. In the present case, shares were allotted on 12 March but the shares were not registered and, therefore, no share certificate could be furnished until 2 April. The shares were allotted on 12 March and issued on 2 April. F

No person can be a shareholder until he is registered. A person who is not a shareholder by registration cannot claim that the share has been issued to him, but only that the company is bound by contract to issue a share to him. A person who has been allotted shares is in as good a position in equity as a person to whom shares have been issued but that does not mean that there is no distinction between allotment and issue; an allotment creates an enforceable contract to issue and accept shares. G

A large number of authorities were cited, in most of which the distinction between "allotment" and "issue" was not material or relevant. Sentences were extracted for some of these authorities in support of the proposition that there was no difference between "allotment" and "issue". One or two of the authorities point the distinction. H

McEuen v. *West London Wharves and Warehouses Co.* (1871) LR 6 Ch App 655 established that shares were vested in a registered shareholder, notwithstanding that he had sold the right to the shares and delivered a scrip certificate to the purchaser. The case was not concerned with the distinction between allotment and issue, but it emphasised the effect of registration. I

Re Heaton's Steel and Iron Co. (Blyth's Case) (1876) 4 ChD 140 held that, once a shareholder had been registered, the issue of a share certificate was not necessary to complete his title.

A *Re Ambrose Lake Tin and Copper Co. (Clarke's Case)* (1878) 8 ChD 635 points the distinction between allotment and issue. Section 25 of the Companies Act 1867 provided as follows:

> "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount B thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares."

Shares were allotted on 19 January. The contract for the allotment of shares for a consideration other than cash was filed with the Registrar of C Joint Stock Companies, pursuant to s 25 of the Act of 1867 on 26 January. The shares were registered in the books of the company after 26 January. It was held that the shares had not been issued until after the contract had been filed with the Registrar of Joint Stock Companies pursuant to the statute, in other words, the shares had not been "issued" until they had been registered in the books of the company. Consequently, the shares were to be treated as D fully paid up shares. This decision which has stood unchallenged since 1878 seems to me to be decisive of the present case. Sir Alexander Cockburn L.C.J. said, at pages 638:

> "The Act of Parliament imposes no condition upon allotment such as it imposes on the issue of shares, and I think that, in as much as the E term 'issue' is used, it must be taken as meaning something distinct from allotment, and as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete. ... I do not think it mate- F rial to consider what may have been done by any allottee who, knowing of the allotment, considered that he was entitled to deal with these shares as his shares, although his title was not then complete. As regards the company, nothing whatever was done beyond that mere allotment of the shares. In my opinion that does not constitute the 'issuing' of the shares, for which something more than the mere allotment is necessary."

G

Cotton L.J. said, at page 640:

> "The question which we have to decide is, whether these shares are to be considered as having been issued before 26 January, that being the day on which the agreement was registered, which provided that they H should be treated as paid up some in full and some in part. What is relied on by the official liquidator? It is this. He says there was an allotment on 19 January of these shares originally to Mr. Taylor, who transferred them to Mr. Clark, and he contends that in consequence of that allotment which was made on 19 January, Mr. Clark ought to be considered as holding shares issued before the registration of I the agreement."

Cotton L.J. continued, at pages 641–642:

> "There are many cases, and *Blyth's* case is an example, where although no certificates have been issued, yet the transaction is complete—the allottee has become complete master of the shares, and a mere

failure to perform the formal act of issuing the certificate does not prevent the shares from being issued within the meaning of the section."

In the present case, it was argued on behalf of the bank that, once an applicant had paid in full and shares had been allotted to him, he was "complete master of the shares". But no one was master of the shares until registration; until then the applicant was only entitled under a contract of which specific performance could be granted, to procure the nominee to be entered upon the register, whereupon and not sooner the nominee would become "master of the shares" acting on behalf of the applicant.

In *Re Florence Land and Public Works Co. (Nicol's Case)* (1883) 29 ChD 421, in which rectification of the register of a company was sought so as to place on the register persons to whom shares had been allotted, Chitty J. said, at page 426:

> "What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance. To my mind there is no magic whatever in the term 'allotment' as used in these circumstances. It is said that the allotment is an appropriation of a specific number of shares. It is an appropriation, not of specific shares, but of a certain number of shares. It does not, however, make the person who has thus agreed to take the shares a member from that moment; all that it does is simply this—it constitutes a binding contract under which the company is bound to make a complete allotment of the specified number of shares, and under which the person who has made the offer and is now bound by the acceptance is bound to take that particular number of shares. In most cases the act of placing the person who has agreed to become a member on the register is a mere matter of form, and may be described as a mere ministerial act; but it appears to me that in point of law all that is done by the process I have just indicated, and all that was done in this case, was to make a complete and binding contract."

In *Dalton Time Lock Co.* v. *Dalton* (1892) 66 LT 704, another case arising under s 25 of the Companies Act 1867, it was held that a subscriber to a company's memorandum of association became a member immediately on registration of the company but this decision did not alter the position of a person who was not a subscriber and, therefore, not a member until his name had been placed on the register of the company.

In *Spitzel* v. *The Chinese Corporation Ltd.* (1899) 80 LT 347, there was some discussion about the difference between the allotment of shares, the issue of shares and the issue of a share certificate. In that case, the shareholder had been entered on the register and given a share certificate but his title to the shares and his membership of the company was, by contract, conditional on the shareholder conveying certain property to the company. It was held that he was not a member of the company until the condition had been fulfilled. This decision upon which reliance was placed by counsel for

A the bank is of no assistance in determining whether shares can be said to be issued before the name of the shareholder is entered on the register.

In *Mosely* v. *Koffyfontein Mines Ltd.* [1911] 1 Ch 73, the directors had power to increase the share capital but it was held that only the company in general meeting had power to issue the shares. The case is of no direct value B in the present circumstances but Sir Henry Cozens-Hardy M.R. said, at page 80:

> "Now the issue of shares is something quite distinct from allotment. ... The difference is apparent, and it is well known in company law. Therefore, assuming the validity of the resolution of the directors to create C these new shares, in my opinion they have no power to issue them, and therefore no power to allot them in the absence of, and without and until, the resolution of the general meeting."

In *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134, it was held that a renounceable allotment letter was not "an issue of D shares". Lord Hanworth M.R. said, at page 155:

> "I have come to the conclusion, after considering a great number of cases which have been brought to our attention, rightly enough, by Mr. Topham, that it is impossible to say that the word 'issue' is used in all Acts of Parliament and in all circumstances with the same meaning. E I think that an illustration of the divergence in its meaning is to be found by looking at *Clarke's Case* [8 Ch. D 635] and contrasting it with the observations made in *Mosely* v. *Koffyfontein Mines Ltd.* [1911] 1 Ch. 73, 80, by the Master of the Rolls. It is obvious that different meanings may be attributed to the word 'issue' according to the circumstances of the particular case under consideration; but in *Clarke's Case*, which went to F the Court of Appeal, it is quite obvious that both the Lord Chief Justice (Sir Alexander Cockburn) and Cotton L.J. really thought of the word 'issue' as something distinct from allotment, and as importing some subsequent act whereby the title of the allottee became complete."

G In *Central Piggery Co. Ltd.* v. *McNicoll* (1949) 78 CLR 594, s 4 of the Industrial Conciliation and Arbitration Acts 1932 to 1947 provided that no company "... shall proceed to the issue to any of its employees any shares in the company" without the consent of the Industrial Court. Shares were applied for, paid for, allotted and registered but the applicant was not notified of the allotment or registration until after he had become an employee of the company. The High Court of Australia held that the Act had been H infringed. Latham C.J. said, at page 598, that:

> "The issue of the shares is the act which ends the transaction and ends in the issue of the shares to a specific person, an employee. The act of issuing involves a set of proceedings which result in the employee becoming a shareholder."

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In that case, the process of issuing shares was not complete until notification because application, payment, allotment and registration preceded notification. In the present case, the issue of shares was not complete on 15 March 1993 because, although there had been application, payment and allotment, there had been no registration.

In the present case, in my opinion, the word "issue" in the taxing statute is appropriate to indicate the whole process whereby unissued shares are applied for, allotted and finally registered. I agree with Dillon L.J. that the shares in the present case were not issued until after 15 March 1993. In his dissenting judgment Hirst L.J. referred to several sections in the taxing statute whereby relief depends on the happening of certain events before or after the "issue" of shares and he deduced an intention that finality should be reached at the date of investment rather than the date of registration of the shares. I can derive no assistance from these sections. Throughout the Act, Parliament has been obliged to choose a fixed and certain date. Parliament has chosen not the date when shares are allotted but the date when they are issued. It was open to the bank in the present case and was open to any other company to ensure that allotment and registration took place on the same day or to ensure that if registration took place after allotment the shares were issued before 16 March 1993. If allotment and registration take place on different days the crucial date chosen by Parliament is the date of registration and not the date of allotment. I would, accordingly, dismiss the appeal.

The appeal by Barclays Bank which was heard at the same time as the appeal by the National Westminster Bank raises exactly the same question. Accordingly, the appeal by Barclays Bank must also be dismissed. In each case the costs of the Respondent Commissioners of Inland Revenue must be borne by the Appellants.

Lord Jauncey of Tullichettle:—My Lords, these appeals concern the meaning which is to be attributed to the word "issued" in relation to shares subscribed for under the business expansion scheme. The Finance Act 1983 introduced the scheme which afforded tax relief to qualifying individuals who subscribed for eligible shares in companies which fulfilled certain qualifications and carried on qualifying trades. The details of the scheme altered over the years and it was brought to an end as from 31 December 1993. At the time of the events giving rise to these appeals, the relieving section in force was s 289 of the Income and Corporation Taxes Act 1988 ("the Taxes Act") of which subs 1(a) as amended was in the following terms:

> "(1) This Chapter has effect for affording relief from income tax where an individual who qualifies for the relief subscribes for eligible shares in a qualifying company, and either—
>
> (*a*) those shares are issued to him after 5 April 1983 [and before the end of 1993] for the purpose of raising money for a qualifying trade which is being carried on by the company or which it intends to carry on ... "

In reliance on these and other provisions in Chapter III of Part VII of the Taxes Act, the schemes which have been more fully described in the speech of my noble and learned friend, Lord Templeman, were prepared. For the purposes of these appeals it is sufficient to summarise the features of the two schemes which are relevant to the question raised.

NatWest Scheme

(1) An irrevocable offer to subscribe for a specified number of shares, with a minimum of 2,000, accompanied by a cheque for the appropriate amount, was made after 2 March 1993.

A (2) When all the shares offered had been fully subscribed for a letter was sent out to each successful applicant in the following terms:

> "Dear Investor,
>
> *The Homeshare Companies*
> *Offer for Subscription made under the Business Expansion Scheme*
>
> We acknowledge receipt of your application and confirm that shares have been allotted to you to the full amount applied for.
> You will receive within the next twenty-eight days a Certificate of Beneficial Ownership in respect of this investment."

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C Your Lordships were informed that the date of the postmark was 12 March 1993.

(3) Non-recourse loans secured on the allotted shares were available at the rate of 74p for every £1 invested and would be advanced six months after allotment.

D

(4) On 2 April 1993 the shares allotted were registered in the name of the nominee.

Barclays Scheme

E (1) A similar offer to that in the NatWest Scheme was made but at a slightly earlier date.

(2) There was sent to each successful applicant a letter dated 4 March 1993 stating, *inter alia*:

F

> "We write to acknowledge receipt of your application form and cheque for [amount] in respect of shares in the Gracechurch BES Companies.
>
> As you may be aware, the Gracechurch BES Issue has been extremely popular with investors. We have been receiving applications since Friday, 26th February 1993 which were then held in strict order of receipt for processing when Subscription Lists opened on Wednesday, 3rd March 1993. For your information applications were processed to the value of the full subscription level of £25 million on the morning of Wednesday, 3rd March 1993.
>
> Subject to clearance of your cheque and the allotment of Shares, your application has been successful.
>
> Subject to and following allotment, you will receive from us, in due course a Certificate of Beneficial Ownership which details the number of Shares allotted to you within the relevant Gracechurch BES Company."

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(3) Non-recourse loans identical to those in the NatWest scheme were available.

(4) On 2 April 1993 the shares allotted were registered in the name of the nominee.

Section 111(1) of the Finance Act 1993 introduced a new s 299A to the Taxes Act which was in the following, *inter alia*, terms: A

"(1) An individual shall not be entitled to relief in respect of any shares in a company issued on or after 16th March 1993 if—

(*a*) there is a loan made by any person, at any time in the relevant period, to that individual or any associate of his; and B

(*b*) the loan is one which would not have been made, or would not have been made on the same terms, if that individual had not subscribed for those shares or had not been proposing to do so."

Since both schemes involved the making of loans by the two banks to the investors, questions arose as to whether the shares had been issued prior to 16 March 1993, in which event the subscribers were eligible for tax relief in respect thereof, or whether they were issued after that date, in which event tax relief would no longer be available. To resolve this problem, the two banks raised actions against the Revenue seeking declarations that all the shares allotted in the two schemes had been issued prior to 16 March 1993. C D

Rattee J.(1) [1993] STC 639 held that tax relief was neither dependent on actual registration of shareholders nor on the issue of share certificates and that the shares in the NatWest scheme were issued when letters of allotment were sent to successful applicants on 12 March 1993 and those in the Barclays scheme on 10 March when it was resolved to allot the shares to the successful applicants, letters of acceptance having already been sent. The Court of Appeal by a majority (Dillon and Mann L.JJ., Hirst L.J. dissenting)(2) [1994] STC 184 allowed the Revenue's appeal, holding that issue involved the completion of the legal title in the allottee which could only take place by registration or issue of a share certificate. E F

I hope that I do not do injustice to the skilful arguments deployed before this House by both parties if I summarise them at this stage by recording that the banks argued that, for the purposes of s 299A, "issue" meant unconditional allotment of shares followed by notification thereof to the allottee, whereas the Revenue maintained that it involved the acquisition of a complete legal title by registration in the register of shareholders and that an equitable title was insufficient G

My Lords, the word "issue" has been recognised as a mercantile rather than as a technical legal term and it derives its meaning from its context. It is neither defined in the Companies Act 1985 nor in the Taxes Act, so that it may have one meaning in one statute and a different one in another. It is, to quote Stirling J. in *Spitzel* v. *The Chinese Corporation Ltd.* (1899) 80 LT 347, at page 351, a word "which has not any very definite legal import with reference to shares", or as Lord Hanworth M.R. said in *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134, 155: "... it is impossible to say that the word 'issue' is used in all Acts of Parliament and in all circumstances with the same meaning". A number of authorities were referred to during the course of argument and although these do not throw any direct light on the proper meaning of the word, some of them are interesting as much for what they do not say as for what they do. H I

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(1) Pages 1/15C *ante*. (2) Pages 15F/30I *ante*.

A In *Re Ambrose Lake Tin and Copper Co. ("Clarke's Case")* (1878) 8 ChD 635, the Court of Appeal were considering whether, for the purposes of s 25 of the Companies Act 1867, a contract had been filed with the Registrar of Companies "at or before the issue" of certain shares. Prior to the filing, shares had been allotted by the directors but no letters of allotment had been sent out and no entry had been made in the register of shareholders. In B rejecting a claim by the liquidators of the company that the shares had been issued prior to registration of the contract, Sir Alexander Cockburn L.C.J. said, at page 638, that "issue":

> " ... must be taken as meaning something. distinct from allotment, and as importing that some subsequent act has been done whereby the C title of the allottee becomes complete, either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete."

On the same page he referred to an allottee who knew of his allotment D not having a complete title. James L.J., at page 639, after referring to the fact that nothing had occurred whereby the shareholder had become bound to take shares in the company, said:

> "Before anything is done by which their title is completed, or by which the evidence of their title as between them and the company is E completed, the mistake is discovered."

The first part of this sentence is in line with what the Lord Chief Justice said about completion of title whereas the second part suggests that a binding contract as between shareholder and company would have been equally significant. Cotton L.J., at page 640, said that shareholders to whom shares had F been issued under a mistake and not in accordance with contract, would have been entitled to say:

> "Cancel that issue, take those shares off the register if they have been put there, and issue to us shares which you can now issue after the registration of the agreement in due performance of the agreement."

G At page 641, he referred to the transaction being complete, the allottee having "... become complete master of the shares".

There is no doubt that the Lord Chief Justice considered that "issue" as used in the section under consideration required the acquisition of a complete title. His reasoning was relied upon by Dillon L.J. in the Court of Appeal H and by the Revenue in this House. However, none of the other three Judges stated the matter in such categorical terms. James L.J. certainty considered that lack of a binding contract was important and Cotton L.J.'s use of the words "... the register if they have been put there", does not support the view that there could be no issue without registration. What is absolutely clear is that, if registration had been a prerequisite of the issue of shares, it I would have been a complete answer to the liquidators' claim, yet the Lord Chief Justice alone of the Court referred to it.

In *McEuen* v. *West London Wharves and Warehouses Co.* (1871) LR 6 Ch App 655, a plaintiff who applied for shares, and thereafter when they were allotted to him, paid the sum required under the allotment was held to

have thereby become a complete shareholder in the company and liable to pay further calls in respect of the shares. (See James L.J., at page 661, Mellish L.J., at page 663). The fact that registration of his shares did not take place until some time after he had made payment was not referred to in the judgments.

Dalton Time Lock Co. v. *Dalton* (1892) 66 LT 704 was another case under s 25 of the Companies Act 1867 arising on liquidation. It decided that the date of registration of a company was the date when shares were issued to a person who had subscribed to the memorandum of association. On that date he was put completely in possession of his shares.

Mosely v. *Koffyfontein Mines Ltd.* [1911] 1 Ch 73 concerned a dispute between the shareholders and the directors of a company as to the construction of two of the articles which provided for the creation and issue of shares, ordinary and preference. The two articles made no reference to allotment. Cozens-Hardy M.R., at page 80, after referring to the fact that the directors had power to create new shares but not to issue them, went on to point out that the issue of shares was something quite distinct from allotment. Farwell L.J. appeared to think that the word "allotment" occurred in the two articles as well as the words "creation" and "issue" and he then, at page 84, referred to the three steps with regard to new capital, namely, creation first, followed by issue and, finally, allotment. Farwell L.J. was thereby negativing any requirement of registration as a necessary component of issue since no registration could take place until the identity of the allottees was known.

In *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134, a new company formed to take over the assets of a company in liquidation sent a letter of allotment to three persons who were shareholders in the old company, which letter contained on its back a form of renunciation. Two of these shareholders executed partial renunciations with the result that they were registered as holders of less than the number of shares provisionally allotted to them. It was held, contrary to the contention of the company, that an allotment letter containing the form of renunciation did not constitute an "issue of shares" for the purpose of exemption from *ad valorem* stamp duty provided in s 55(1)(c)(i) of the Finance Act 1927. Finlay J., at page 152, found it unnecessary to "... go into the somewhat perplexed questions whether, in order to constitute an issue, there must be a registration or a certificate or both" and instead dealt with the case on the basis that "... there was no issue to the old shareholders, because the old shareholders desired that, instead of the issue being to them, the issue should be to somebody else". In reaching this conclusion Finlay J. was effectively saying that there had never been a binding contract between the company and the old shareholders whereby the latter undertook to take the number of shares allotted by the letter.

In the Court of Appeal Lord Hanworth M.R., at page 155, said:

> "It is obvious that different meanings may be attributed to the word 'issue' according to the circumstances of the particular case under consideration; but in *Clarke's Case*, which went to the Court of Appeal, it is quite obvious that both the Lord Chief Justice (Sir Alexander Cockburn) and Cotton L.J. really thought of the word 'issue' as something distinct from allotment, and as importing some subsequent act whereby the title of the allottee became complete."

A Slesser L.J. found assistance in construing the word "issue" when applied equally to a shareholder or to a company in s 55(6)(b) of the Finance Act 1927 which referred to the existing company ceasing "... to be the beneficial owner of the shares so issued to it". He continued, at page 157:

> "I think there is contemplated in both cases a continuity of personality and that the word 'issue' means such an issue as effectually makes the shareholder in the new company a beneficial owner and not merely a person with an equitable right to call upon the company subsequently to register him as a beneficial owner, as would be the case if the mere allotment in itself, accompanied by a form of renunciation, were to be the same as 'issue'."

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Romer L.J. considered that whatever the word might mean in other collocations, it was there "equivalent to the creation of a registered shareholder".

Two points emerge from this case, namely:

D

(1) that the terms of the letter of allotment were such that, until the three shareholders had exercised their power to renounce or the time for exercise of such power had passed without a renunciation having taken place, there could be no binding agreement between them and the company to take the shares and to assume the rights and liabilities of shareholders; and

E

(2) that no meaning of universal application is to be attributed to the word "issue".

In *Central Piggery Co. Ltd.* v. *McNicoll* (1949) 78 CLR 594, the High Court of Australia had to consider the words "... proceed to the issue" of F shares to employees of a company in the context of the Industrial Conciliation and Arbitration Acts 1932–1947. The circumstances were that A and B applied for allotment of shares in the company. Three days later the directors resolved to allot to them the number of shares applied for. A week later their names were entered in the register of shareholders and about two weeks thereafter they were notified of the allotments and subsequent registra-G tion. Prior to such notification they had entered the employment of the company. Latham C.J., at page 597, considered that "... the applicants did not become shareholders until notification of the allotment was received by them or perhaps placed in the post". At page 598, he said: "the issue of the shares is the act which ends the transaction and ends in the issue of the shares to a specific person, an employee". Dixon J., at page 599, said:

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> "Speaking generally the word 'issue' used in relation to shares means, where an allotment has taken place, that the shareholder is put in control of the shares allotted. A step amounts to issuing shares if it involves the investing of the shareholder with complete control over the shares."

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At page 600, he said:

> "In the present case it is clear that neither McNicoll nor Hurst had become parties to a binding contract before 5 October. There had been no communication to either of them accepting their offers, and there could be no contract until there was an acceptance. They were not mas-

ters of their shares and were in the position that they could repudiate. When they became the servants of the company they were not shareholders. The transaction was inchoate and did not become effective until there was a communication of the acceptance. On communication there was a culmination of the process and the shares were issued."

What is interesting about this case is that both the Chief Justice and Dixon J. considered that what was necessary to constitute an issue of shares was a binding contract between the applicant and the company. The fact that registration had taken place prior to completion of the contract was mentioned in none of the three judgments.

Finally, in *Re J. N. 2 Ltd.* [1978] 1 WLR 183, Brightman J., in holding that a winding-up petition could be presented by an allottee of shares although his membership of the company was not recorded in the register of members, pointed out, at page 187, that the register was only *prima facie* evidence of the matters directed or authorised therein and was not even conclusive evidence because of its liability to be rectified.

My Lords, I have gone rather laboriously through these cases because it seems to me that there is in them nothing to support the view that a share can never be issued until the allottee's name has been registered. Sir Alexander Cockburn L.C.J.'s reference in *Clarke's Case* to registration of the shares and the reference by the other Judges to title being completed or being complete master of the shares were made, as were similar remarks by Lord Esher M.R. in *Dalton Time Lock Co.* v. *Dalton*, solely in relation to a section of the Companies Act designed, at least in part, for the protection of creditors of the company. Slesser L.J.'s reference in *Oswald Tillotson* v. *Commissioners of Inland Revenue* to the issue which makes the shareholder a beneficial owner and those of Romer L.J. to a registered shareholder, were made in the context of a provision which afforded relief from stamp duty where shareholders in an existing company received shares in a transferee company during the course of a reconstruction or amalgamation. For this purpose it was important that the shareholders in the existing company should become shareholders in the transferee company with the same full rights as they had previously possessed.

As I have sought to show, the foregoing references in these three cases are explicable in the context of the statutory provisions in which the word "issue" was used. The authorities make clear that the meaning of the word in one statute is not necessarily the same as that in another. What does, however, emerge from the weight of authority is that there must be a completed contract between a company and an allottee of shares before there can be said to be an issue.

Just as the authorities are not conclusive as to the meaning of the word "issue", so the textbooks to which the House was referred do not speak with one voice. *Gower's Principles of Modern Company Law* 5th edition, at page lxxxvi, defines "issue" as "... the process by which a share or shares in a company is assigned to the first holder(s) of the share(s) in consideration of the nominal value of the share(s) ... ". *Buckley on the Companies Acts,* 14th edition, at pages 147–148, suggests that the question may be "... whether the shareholder has or has not been put completely in possession of his share, and this may be so, although some formal act may not have been completed". *Pennington's Company Law,* 6th edition, deals with the matter at

A some length, at pages 311–312, and considers "... the issue of the securities occurs when the company sends a document to the subscriber indicating that the securities have been allotted to him and evidencing his title to them". *Halsbury's Laws of England,* 4th edition, reissue, vol. 7(1), para 425, considers that a resolution to allot shares not necessarily the issue of them, and the term seems to mean allotment followed by registration or possibly by some B other act, distinct from allotment, whereby the title of the allottee becomes complete". At vol. 7(1), para 170, the same work considers that shares which are properly allotted are part of the issued capital of a company just as shares which are registered in a person's name. *Gore-Browne on Companies,* 44th edition, at para 9.5, considers that an allottee becomes a shareholder although not a member of a company before registration, thereby echoing the C views expressed by James and Mellish L.JJ. in *McEuen* v. *West London Wharves and Warehouses Co*. The first three-mentioned textbooks make no reference to registration in the context of issue and *Halsbury* alone appears to consider that it may be relevant thereto.

D I have already remarked that the Companies Act 1985 contains no definition of issue but there are in it a number of sections to which Mr. Grabiner Q.C., for the Revenue, referred as bearing upon the construction of s 299A. Under s 22, a person becomes a member of a company when his name is entered in the register. Section 185(1) provides that share certificates will be ready for delivery within two months after allotment and s 186 E provides that a share certificate shall be *prima facie* evidence of the title of a member to his share. The latter section clearly presupposes that a shareholder has become a member by registration prior to the delivery to him of the certificate. These sections throw little or no light on the meaning of the word.

Of more significance, however, is s 738 which provides that "... shares F are to be taken for the purposes of this Act to be allotted when a person acquires the unconditional right to be included in the company's register of members in respect of those shares". Such an event would not happen on the mere resolution by directors to allot shares in response to an application therefor, but would only occur when the resolution had been notified to the allottee thereby conferring upon him an absolute right to have those shares G registered in his name. Therefore, allotment for the purposes of the Companies Act is likely to include the two components of allotment by the directors followed by notification thereof which, Mr. Kentridge Q.C., for the banks, maintains, together constitute issue for the purposes of s 299A.

H Against the foregoing background I turn to consider the provisions of Part VII of the Taxes Act. Apart from its occurrence in ss 289(1) and 299A, to which I have already referred, the word "issued" occurs in several other sections but, with two exceptions to which I shall come in a moment, neither party sought to draw much support from these provisions. However, in relation to s 289(5) which provides that relief shall be given as a deduction from I "... total income for the year of assessment in which the shares are issued", Mr. Kentridge submitted that it would be strange indeed if a shareholder's right to relief in a year of assessment could be defeated by a failure on the part of the company to register his holding in that year. Mr. Grabiner countered this argument by emphasising the need for certainty of date when shares were issued which could more readily be ascertained by inspection of the register which would contain the date.

Mr. Grabiner also relied on s 311(1) which is in the following terms: A

> "Shares subscribed for, issued to, held by or disposed of for an individual by a nominee shall be treated for the purposes of this Chapter as subscribed for, issued to, held by or disposed of by that individual."

He argued that if a share was issued when the resolution to allot was B intimated to the applicant, the reference to "issued to" in the subsection would be unnecessary inasmuch as it would have been already issued to the applicant before it was registered in the name of the nominee. If this was the situation which the subsection contemplated, there would be some force in this argument. However, I do not consider that it is. The English of the subsection is inelegant but if the word "by" is inserted after the words "sub- C scribed for" where they occur, it becomes clear that the subsection contemplates subscription by and issue to a nominee which would be deemed to be subscription by and issue to an individual. The words "issued to", accordingly, could have content in relation to both arguments but their inclusion in the subsection throws no further light upon their meaning therein or in any other section of Part VII of the Act. D

My Lords, it may well be that, having regard to the provisions of s 738 of the Companies Act 1985, something more than allotment by the directors followed by notification thereof to the applicant is required to constitute "issue" for the purposes of that Act. No doubt it would be neat and tidy if E the word "issue" were to be given the same meaning in every statute but it is clear from the authorities that this is not the position. The Companies Act provides a code for the incorporation and management of companies involving, *inter alia*, the relations between members and the company, members *inter se*, and the company and its creditors as well as such matters as transmissibility of shares. Its detailed purposes are manifold. By contrast, the pur- F pose of the business expansion scheme is relatively simple, namely, to encourage smaller business to commence or expand by raising capital from investors who, but for the inducement of tax relief, would be unlikely to put money into such concerns. What is, therefore, important for the purposes of the scheme is that the investor should have irrevocably paid over the money to the company in question and should have acquired the rights and assumed G the liabilities of a shareholder. When the company has raised the money and the investor is fully committed, expansion can take place and the purpose of the scheme has been achieved. Registration of the investor as a member in no way furthers that purpose. It must be remembered that, at least for some time after a particular investment, the shares in question are most unlikely to be transmissible and, accordingly, during that period it will be of little conse- H quence to an investor whether he has an equitable or a legal title thereto. The company is contractually bound to register him as a member and thereafter to deliver to him the appropriate share certificate but in the context of the business expansion scheme these matters are purely incidental thereto. In the absence of any specific provision thereanent it is difficult to see what interest the Revenue can have in registration. The investor has parted with his money I and the company has received it. He is thus fully committed to share in the fate of the company and requires to do nothing further. Why then should the Revenue have an interest in the formality of registration which in no way affects the facial position of either company or investor? It will be for him to establish that a share was issued in the fiscal year for which he claims relief and, if he can do this satisfactorily without relying on registration, I can see no reason why he should not obtain relief. In these circumstances, I am

A satisfied that the word "issued" in s 289(1) and 299A(1) did not require the registration of shares to which it applied. It follows that all the shares to which these appeals apply were issued before 16 March 1993 for the purposes of s 299A(1) of the Taxes Act. I would only add that if those responsible for the drafting of the above two subsections had considered that registration was a requisite of relief, it would have been perfectly simple to have so provided. B Instead, however, the initiators of the legislation chose a word which is widely accepted to be capable of different meanings according to its context and thereby suggested that registration was not critical.

For the foregoing reasons, I would allow the appeal.

C **Lord Slynn of Hadley**:—My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Templeman and Lord Jauncey of Tullichettle. Despite the forceful opinion of Lord Jauncey, I agree with Lord Templeman that, for the reasons he gives, these appeals should be dismissed. I accept that the word "issue" has been seen to have different meanings in different contexts, though I do not find helpful the distinction D sought to be drawn in argument between giving the words a "technical" meaning and a "mercantile" meaning in the present context. In my view, the judgment of Sir Alexander Cockburn L.C.J. in *Re Ambrose Lake Tin and Copper Co. (Clarke's Case)* (1878) 8 ChD 635, 638, is, of all the cases to which we were referred, the most persuasive. Following that judgment, I do not consider that the shares in the present case were "issued" E on "allotment"; they were not issued until registration took place. They were, accordingly, not issued until after 15 March 1993.

Lord Woolf:—My Lords, I have had the advantage of reading in draft the speeches of Lord Templeman and Lord Jauncey of Tullichettle. They review the relevant authorities and clearly identify the reasons why it is possi- F ble to reach different views as to what should be the outcome of this appeal. They enable me to set out my own reasons for coming to the conclusion that this appeal should be allowed very much more shortly than otherwise would be the case. I agree with the analysis which they contain of the previous authorities. I also agree with the reasons given by Lord Jauncey for allowing this appeal.

G

For the ten years from 5 April 1983 to the end of 1993, it was Government policy that investments in qualifying companies for the purposes of the business expansion scheme (BES) should be encouraged by providing that investors should receive tax relief on the amount invested. However, that relief was not provided indiscriminately. It was hedged by statutory conditions H which had to be complied with before the relief was available.

The relevant statutory provisions which set out the conditions are contained in Chapter III of the Income and Corporation Taxes Act 1988 as amended. The material sections are 289–312. The majority of those sections have at least one reference to shares which have been "issued" to the tax- I payer and the date on which the shares are issued is central to the working of the scheme. For example, the date is critical for determining whether the subscription for the shares qualifies for relief (s 289(1)); whether the shares are "eligible shares" (s 289(4)); the year of assessment for which the relief will be given (s 289(5) and (7)); and the year of assessment in which the shares were "issued" to the taxpayer (for the purpose of calculating whether he has dur-

ing that year subscribed the minimum investment of £500 in a company and not exceeded the maximum subscription of £40,000, in respect of which, relief can be granted in any year of assessment) (s 290). In addition, the taxpayer in order to qualify for relief needed to be resident and ordinarily resident in the United Kingdom at the time the shares were issued and not a connected person during a period calculated with reference to that time (ss 289(12) and 291):

As the date of the issue of shares played this central role, it was natural that when s 299A was added to Chapter III in order to end the undesirable exploitation of the tax relief by the use of "loan linked investments", the new section provided that relief would not be available "... in respect of any shares in a company issued on or after" the specified date, that is to say 16 March 1993. This was entirely consistent with the provisions of the legislation prior to the amendment. What is surprising is that the date of the "issue of shares" should have been given such a central role in Chapter III, without the Act making it clear what constitutes the "issue of shares" since it was well established that the meaning of the term could depend on the context in which it was found. This had been made clear at least since 1932 (by Lord Hanworth M.R. in *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134, at page 155).

Having examined the variety of sections in which the term "issue of shares" is used, I find nothing to indicate that the term has any different meaning in one context rather than another in Chapter III and I, therefore, conclude its meaning is the same throughout the Chapter. What then is this meaning? As to this I do not believe either the context in which the phrase is used or the authorities examined in the speeches of Lord Templeman and Lord Jauncey provide any clear guidance. All that can be said is that if the legislator had intended that the registration of the holder of shares was essential for their issue, it is surprising this was not made clear. This is particularly the case as the company has the ability to control the date of registration and in some situations it could be in the company's interest to postpone registration.

Like Hirst L.J. in the Court of Appeal, I find Rattee J.'s statement, towards the conclusion of his judgment, in accord with what I would expect to be the intent of the statute when he said the shares would be issued(1):

> "... on a situation having arisen in which each party is irrevocably bound, on the part of the company, to complete those formalities, and, on the part of the taxpayer, to submit to their completion."

This approach is also in accord with the way in which the case was argued by Mr. Kentridge Q.C., on behalf of the Appellants. He submitted that what is required for shares to be issued is that the taxpayer should have subscribed for the shares, that includes his having paid for them, that the shares should have been allotted to him and that there should have been communication by the company to the taxpayer of its acceptance of his application for shares. For the latter purposes, it makes no difference whether the shares are allotted before or after the communication of acceptance. He would then be beneficially entitled to the shares and could require the company to confer upon him the full rights of a shareholder. I find it difficult for

(1) Page 14I *ante*.

A this situation to exist without the company being treated as having issued the shares.

Mr. Grabiner Q.C., however, in accord with the views of the majority of the Court of Appeal, contends that the shares cannot be regarded as being issued until they are registered by the company. Mr. Grabiner cannot and B does not argue that the issue of the shares and their registration should always be simultaneous. This is because while normally the person who is registered as the owner of the shares has previously agreed to accept the allotment of the shares, this is not inevitably the case and Mr. Grabiner recognises that there has to be agreement to take the shares, in addition to registration, before the shares can be regarded as being issued. Mr. Grabiner C accepts that this is the situation because of the decision of the High Court of Australia in *Central Piggery Co. Ltd.* v. *McNicoll* (1949) 78 CLR 594.

A further complication which arises if the time of issue is the time of, not prior to, registration, is that this involves accepting that there was an D error made with the consolidation of the income tax legislation in the Income and Corporation Taxes Act 1988, a result to which the Revenue very properly draw attention in their case. The error arises as a result of the terms of what is now s 288(5) of the Taxation of Chargeable Gains Act 1992, the successor to s 64(2) of the Capital Gains Tax Act 1979, which provides:

E "For the purposes of this Act, shares or debentures comprised in any letter of allotment or similar instrument shall be treated as issued unless the right to the shares or debentures thereby conferred remains provisional until accepted and there has been no acceptance."

Under this provision clearly registration was not required for the shares to be issued. Yet when capital gains tax exemption was extended to BES F shares issued after 18 March 1986, if the Revenue's argument is correct, this was either not appreciated by the draftsman or by omission not catered for, since it could not have been intended that shares should be treated as *issued* for the purpose of one exemption but not the other. Mr. Grabiner argues that he can pray in aid that the capital gains tax legislation indicates that "issue" does not normally have the meaning contended for by the Appellants G "... because if it did this definition (which is to substantially the same effect) would be unnecessary". I do not consider that either the error or this point of Mr. Grabiner provides any real assistance. Wisely in the capital cains tax legislation a precise definition is given which avoids the uncertainty which exists, because of its absence, in the case of the BES legislation. What the statutory definition provided for capital gains tax does, however, indicate is that it is H perfectly practical for fiscal purposes to have a meaning given to the "issue of shares" which does not require the shares to be registered. This undermines Mr. Grabiner's argument that the Appellants' interpretation could not have been intended to apply to the BES scheme because it would prove impractical.

I While I accept that there are advantages which would follow if the date of registration of the shares had been adopted as the determinative factor for deciding whether a date for qualifying for BES relief had been met, I do not consider that those advantages are sufficiently compelling to discard what I regard as the more obvious interpretation urged by Mr. Kentridge. The advantages of a test based on registration should not be overestimated. As

already indicated, in a minority of cases registration will pre-date the issue of the shares and the critical time will still be when the taxpayer agrees to accept the shares. A substantial period can elapse between the shareholder doing everything which he is required to do and the shares being registered by the company. It is the shareholder who will be likely to suffer not the company due to non-registration, because he will lose the tax relief to which he would be otherwise entitled, on the Revenue's argument. Yet the shareholder has no direct control of when registration takes place.

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While a shareholder theoretically has rights to inspect the register, he rarely does so and in the case of many BES issues, the register will not be kept by the company itself but by some agent on its behalf. While it is only from his name being entered in the register that a shareholder becomes a member of the company and is directly entitled to exercise all the rights of a member, for practical purposes, the question of whether he is registered or not is of no interest to the taxpayer or the Revenue, unless registration is essential for the shares to be issued. If a nominee company is involved, as here, it will not even be the taxpayer's name which appears in the register. Brightman J.'s words in his judgment in *Re J. N. 2 Ltd.* [1978] 1 WLR 183, at page 187, can be read to place the Revenue's proposition in proper prospective. He said:

C

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> "The ... proposition would be needlessly legalistic. The register is only prima facie evidence of the matters directed or authorised to be inserted therein: see s 118. It is liable to be rectified under s 116. It is not even conclusive evidence until rectified ... every person who holds shares will, save in exceptional circumstances, know that they have been allotted or transferred to him. But not one shareholder in a thousand is likely to pursue the register of members or to know for certain that his name is entered therein."

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F

Unless, therefore, there was some compelling reason for rejecting the test put forward by Mr. Kentridge, on behalf of the Appellants, I would adopt his test in preference to that of the Revenue. It seems to me that as a matter of language it is not only legalistic but artificial to import into the issue of shares a requirement of registration. You would expect a person, to whom shares have been issued, to be a holder of those shares but not necessarily a member of a company. The register is not a register of holders of shares but of members of the company. The normal sequence of events is that you first become a holder of shares and then have your holding entered in the register and you then become a member. I can see no significant advantage either to the Revenue or the taxpayer in making the test whether or not the name of the nominal holder of the shares appears in the register (except that the default of the Appellants in not taking the precaution of ensuring the entries were made in the registers in these cases will produce a useful windfall for the Revenue).

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Whatever else may be said about the previous authorities, they are certainly not conclusive. They could not be so because they deal with different statutory contexts and it is not in dispute that the context can effect the meaning. In view of what is in the other speeches of their Lordships, I, therefore, confine myself to the following comments on the most relevant decisions.

I

The case which is probably most helpful to the Revenue is *Clarke's Case* (1878) 8 ChD 635. However, it is authority for the proposition that the term

A "issue" in s 25 of the Companies Act 1867 involves something more than the allotment of shares. This is not contentious. In his judgment, on which the Revenue particularly rely, Cockburn L.C.J. says[1]:

> "... I think that, inasmuch as the term 'issue' is used, it must be taken as meaning something distinct from allotment, and as importing B that some subsequent act has been done whereby the title of the allottee becomes complete either by the holder of the shares receiving some certificate, or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire and complete."

C It will be noted that the entry on the register is only one of three alternatives referred to by the Chief Justice. Therefore, in relation to the section there being considered, it cannot be said that the issue of the shares is being made dependant on registration. Mr. Kentridge compares the language of the Chief Justice with the opening words of the judgment of James L.J. when he said:

D

> "It seems to me quite clear that up to the time and at the time when the agreement in question was registered ... nothing had occurred by virtue of which the company could have said to the shareholder, 'You are bound to take shares from me' nor anything by virtue of which the shareholder could have said 'I have become a shareholder in your company'."

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This is just what both the Appellants and the shareholders would have been able to say in the present appeals when the shareholders had been informed of the allotment.

F The next case to which I should refer is *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134. The distinguishing feature of that case was that the letter of allotment was renounceable. As Finlay J. said in that case, at pages 151–152:

> "I think what the company are there saying to the shareholders is this: 'You are entitled to shares; do you want them or do you prefer that G someone else should have them; the shares are not issued yet, but you are entitled to have shares issued to you. Do you want them issued to you?' ... Now, if that is right it seems to me that the answer to the case must be that, if the shareholder who has a right to have the shares issued to him, or has an equitable title to the shares, says: 'No, I will not have them issued to me, I want them to be issued to A.B. instead,' then there H is no issue to the shareholder, but there is an issue to A.B. That seems to me to be the result. If that is right, it is not necessary to go into the somewhat perplexed questions whether, in order to constitute an issue, there must be a registration or a certificate or both, whether either is necessary, whether one will do without the other or any of these matters ..."

I

The case went to appeal and, on appeal, Lord Hanworth M.R. made the remark about the different meanings of the word "issue" to which I have previously made reference. He added in relation to Sir Alexander Cockburn's

[1] (1878) 8 ChD 635, at page 638.

judgment in *Clarke's Case* that the word "issue" "is something more than the mere giving of an allotment letter" and "... the test has to be applied whether the shares ultimately belong to some person ...". Slesser L.J referred to "issue" effectively making the shareholder "a beneficial owner" and not merely a person with "... an equitable right to call upon the company subsequently to register him as a beneficial owner", but he was there referring to the "mere allotment in itself, accompanied by a form of renunciation". Romer L.J. perhaps came closest to supporting the Revenue's argument when stating that "... whatever the word 'issue' may mean in other collocations, here it is *equivalent* to the creation of a registered shareholder". (Emphasis added).

The final case to which I will make reference is one to which I have also already referred. This is the decision of the High Court of Australia in *Central Piggery Co. Ltd.* v. *McNicoll.* I find this case as helpful to the Appellants as it is to the Revenue. It is true that significance was attached to registration but not registration alone. Latham C.J. said, at page 397:

> "In the present case the applicants did not become shareholders until notification of the allotment was received by them or perhaps placed in the post."

Later, he said:

> "The section deals with the whole process from the initial step to the actual issue. The words used are "issue to any employee". The issue of shares is the act which ends the transaction and ends in the issue of shares to a specific person ... the act of issuing involves a set of proceedings which results in the employee becoming a shareholder."

Rich and Dixon JJ. agreed with this approach. However, Rich J. did say (at page 598); "the word 'issue' is one which has not any very definite legal import with reference to shares" and Dixon J. (at page 600) made the following revealing comment:

> "There has been no communication to either of them accepting their offers, and there could be no contract until there was acceptance. They were not masters of their shares and were in the position that they could repudiate. When they became the servants of the company they were not shareholders. The transaction was inchoate and did not become effective until there was communication of the acceptance. On communication there was a culmination of the process and the shares were issued."

The emphasis in this passage on acceptance I find helpful since it is consistent with the determining question being, is the investor beneficially entitled to the shares? For this to be the position, there must in the present context be in existence a binding contract which makes him the beneficial owner. If there has been no acceptance, there is no contract.

In that case, the registration preceded the contract. In the present cases the contract preceded registration. In both sets of circumstances, in deciding whether or not there has been an issue of shares, it seems to me that registration is not conclusive. Merely if there has been registration, in the majority of cases that will mean that there has also been an issue of the shares which are entered in the register. However, if there is a binding contract, a delay in registration does not prevent there being an issue of shares.

A I conclude with what I regard as being a general point which is not without importance. The dispute here is as to the steps which have to be taken by the deadline if the taxpayer is to avoid losing an existing tax relief. If Parliament has not made it clear that any particular step has to be taken before that deadline, the courts should be slow to require that step to be taken, in order to avoid unfairness.

B

I would, accordingly, allow these appeals and grant appropriate declaration.

Lord Lloyd of Berwick:—My Lords, in a case in which four Judges have taken one view of the meaning of a single word, and an equal number of C Judges have taken another view, it would be presumptuous to say that I have found the solution easy. Nevertheless, I have no doubt that, for the reasons given by Dillon L.J. in the Court of Appeal, the question must be answered in favour of the Crown. I would indeed have been content to adopt Dillon L.J.'s judgment as my own. But out of deference to those who have taken a different view, I should state my reasons briefly.

D

Although "issue" may bear a different meaning in different contexts, "issued" in s 299A must bear the same meaning as it does in other places in Chapter III of Part VII of the Income and Corporation Taxes Act 1988. Sometimes the word is used on its own, as in s 289(1)(b)(i) and (d)(i). Sometimes it is used in conjunction with the preposition "to", as in the E phrase "issued to him" in s 289(1)(a), (b) and (c), or "issued to ... a nominee", in s 311. Clearly, the word means the same whether it appears with or without the preposition.

It is said that "issue" is not a term of art, and that the word must be F given its mercantile meaning. I agree. But the meaning must be appropriate to the context, and the context here is that of company law.

Allotment is defined in s 738 of the Companies Act 1985. Shares are taken to have been allotted "... when a person acquires the unconditional right to be included in the company's register of members in respect of those G shares". If Parliament had intended relief under Chapter III to depend on the date when the taxpayer makes his investment, and if time under s 289 was intended to run from that date, one would have expected to find allotment, rather than issue as the *terminus a quo*. But Parliament has chosen the date of issue. Mr. Kentridge, for the taxpayer, accepts that the issue of shares to a shareholder involves something more than their allotment. The question is what that something more is.

H

Rattee J. held that the additional factor required for the shares to have been issued to the taxpayer is that the taxpayer should have become irrevocably bound to accept registration as a member of the company. Hirst L.J. took the same view in his dissenting judgment in the Court of Appeal. I do I not share that view. To my mind, the phrase "issued to him" in s 289 implies "... something emanating from the company", some conduct or activity on the part of the company, or some step taken on the company's behalf, rather than the incurring of a contractual obligation on the part of the taxpayer. There are three possible steps from which to choose. The first is the communication by the company to the taxpayer that the application for shares has been accepted. The second is the entry of the taxpayer's name on the register.

The third is the issue of the share certificate. Of these the obvious choice is registration.

It is said that entry on the register is a mere formality. I do not agree. It is the culmination of the process which starts with the issue of the prospectus. It marks the moment at which the taxpayer becomes a member of the company: see s 22(2) of the Act of 1985. It is the step which completes the taxpayer's legal title to the shares. Until then, he has no more than a right to be included on the register.

But even if entry on the register were a mere formality, I would not regard that as a strong point in the taxpayer's favour. For registration has this advantage over other possible options, that the date of registration must itself appear on the register: see s 352(2)(b) of the Act. No doubt it would be possible to ascertain by investigation in each case the date on which the taxpayer became irrevocably bound to submit to the formality of having his name entered on the register. But the register itself is a public document, open to inspection by all. It provides a simple and certain answer to the question when the shares were issued. These are good reasons why the date of registration should have been the option adopted by Parliament.

Finally, it is said that if Parliament had intended the date of registration to be the critical date, it would have been simple enough to say so. This is true so far as s 299A is concerned. But it is not so true of the many other places where "issued"' and "issued to him" occur in Chapter III. In any event "issue" is not synonymous with entry on the register. It means the whole process starting with the prospectus and culminating with the entry on the register. Only then is the issue of the shares complete.

There was some discussion during argument that the taxpayer might suffer hardship as a result of being locked into an investment without being able to control the date of registration. I do not attach much importance to this. True it is that, by foregoing the loan, he would lose the immediate profit to which Lord Templeman has drawn attention in his speech. But he would still be entitled to tax relief under s 289.

As for the authorities, In *Re Ambrose Lake Tin & Copper Co. (Clarke's Case)* (1878) 8 ChD 635 and *Oswald Tillotson Ltd.* v. *Commissioners of Inland Revenue* [1933] 1 KB 134 provide strong support for the Crown's case. I would add to the passages cited by Lord Templeman, the judgment of James L.J. in the former case, and that of Romer L.J. in the latter. I can find nothing in the authorities which points in favour of the taxpayer.

As for the textbooks, the choice lies between *Pennington's Company Law*, 6th ed., page 311 and *Halsbury's Laws of England*, 4th ed., vol. 7(1), para 425, edited by Walton J. and approved by him at first instance in *Agricultural Mortgage Co. Ltd.* v. *Inland Revenue Commissioners* [1978] Ch 72, 82. I prefer the latter, and would regard the passage in *Pennington* as erroneous.

For the reasons which I have stated, and those stated more fully by Lord Templeman, I too would dismiss this appeal.

A *Appeals dismissed.*

[Solicitors:—Messrs. Lovell White Durrant; Solicitor of Inland Revenue.]